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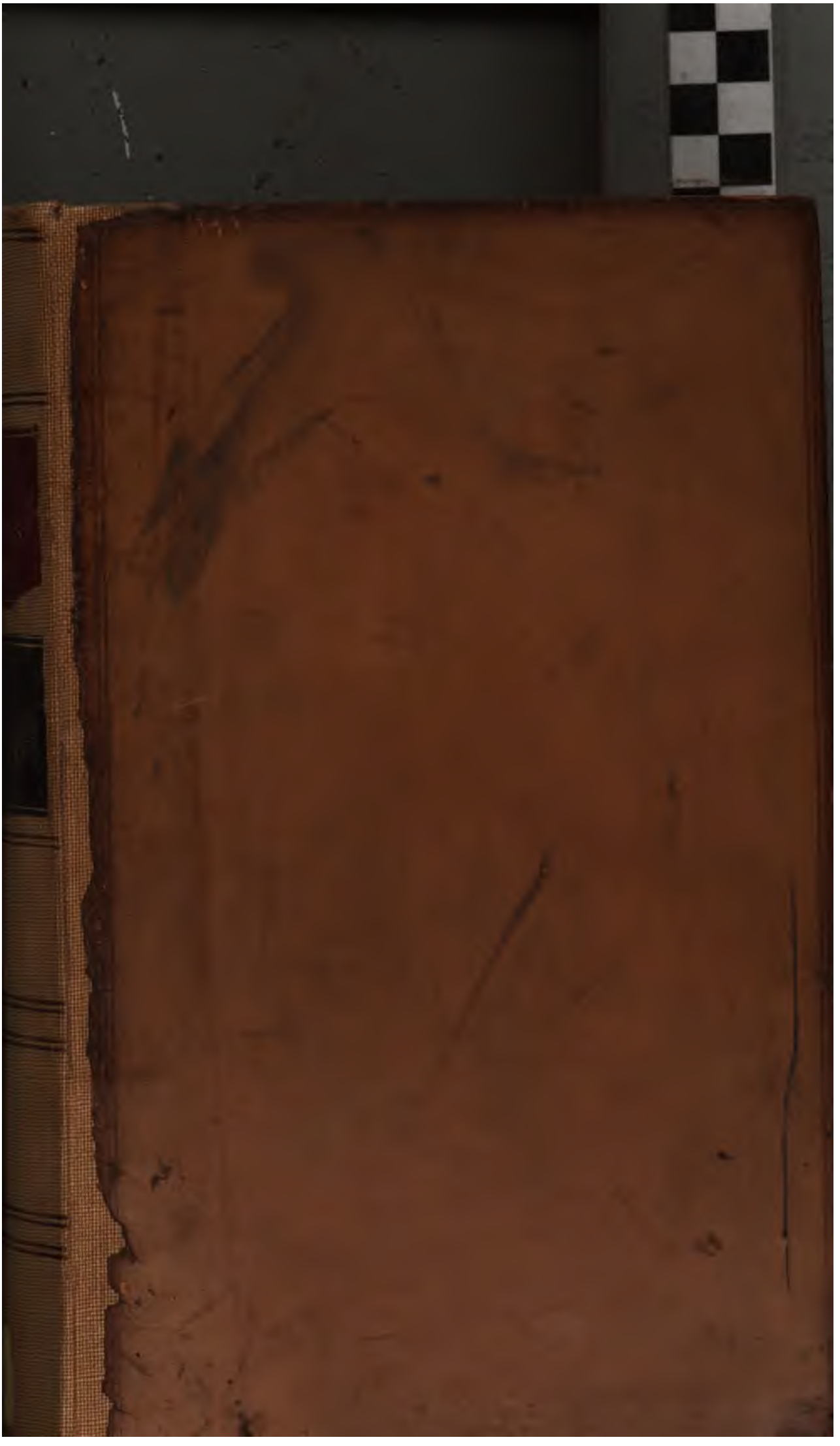
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P. 40.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Queen's Bench,

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

MICHAELMAS AND HILARY TERMS,

IN THE

SECOND YEAR OF VICTORIA.

BY

THOMAS ERSKINE PERRY, ESQ.

AND

HENRY DAVISON, ESQ.

OF THE INNER TEMPLE, BARRISTERS AT LAW.

VOL. I.

WITH

AN INDEX OF THE PRINCIPAL MATTERS.

LONDON:

S. SWEET, 1, CHANCERY LANE; A. MAXWELL, 32, BELL YARD;
AND V. & R. STEVENS AND G. S. NORTON, 26 & 39, BELL YARD;
Law Booksellers and Publishers:
AND MILLIKEN AND SON, GRAFTON STREET, DUBLIN.

1839.



LONDON:
C. ROWORTH, AND SONS, PRINTERS, BELL-YARD,
TEMPLE-BAR.

JUDGES

OF THE

COURT OF KING'S BENCH,

During the period comprised in this volume.

The Right Hon. THOMAS Lord DENMAN, C. J.

The Hon. Sir JOSEPH LITTLEDALE, Knt.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

A

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ERRATA.

Page 142, line 16, for "*plaintiff*" read "*defendant.*"
—— 169, — 10 from the bottom, for "*with*" read "*without.*"

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

IN

MICHAELMAS TERM,

IN THE SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,

Lord DENMAN C. J. — WILLIAMS J.

PATTESON J. — COLERIDGE J.

1838.

In the Bail Court,

LITTLEDALE J.

GENERAL RULE.

Nov. 1838.

WHEREAS it is provided by the Act of the 1st and 2nd of her present Majesty, ch. 45, s. 3, that after the 1st day of November, 1838, any person entitled to be admitted an attorney of any of the superior Courts of Common Law at Westminster, shall, after being sworn in and admitted as an attorney of any one of the said Courts, be entitled to practise in any other of the said Courts, upon signing the roll of such Court, and not otherwise, in like manner as if he had been sworn in and admitted an attorney of such Court; provided that no additional fee, besides those payable under the Act of the first year of the reign of her present Majesty, c. 56, shall be demanded or paid; and that the fees payable for such admission shall be apportioned in such manner as the Judges of the said Courts, or any eight of them, shall by any rule or order made in term or vacation, direct and appoint:

1833.

RULE OF COURT.

We, therefore, direct and appoint, that the fees payable by virtue of the said last-mentioned Act for the Judge's fiat, be received in the first instance by the clerk of the judge granting the fiat, and paid over by him to the clerk of the Chief Justice or Chief Baron of the Court, as the case may be, and the day after each term all the fees so received shall be divided into fifteen portions, one of which shall be paid to the clerk or clerks of each Judge; and further, that the fees payable by virtue of the said Act to the ushers, shall be received in the first instance by one of the ushers of the Court in which the admission shall take place, and shall on the day after each term be divided into three equal portions, one of which shall be paid to the ushers of each Court.

(Signed) DENMAN, J. B. BOSANQUET,
N. C. TINDAL, E. H. ALDERSON,
ABINGER, J. PATTESON,
J. A. PARK, J. GURNEY,
J. LITTLEDALE, J. WILLIAMS,
J. VAUGHAN, J. T. COLERIDGE,
J. PARKE, T. COLTMAN.

Friday, November 2nd.

BAINBRIDGE *v.* FIRMSTON.

Assumpsit. Declaration, that in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh divers boilers of the plaintiff, the defendant promised to give them up to the plaintiff in the same condition as at the time of such consent. Averment, that by such consent the defendant weighed them, and breach:—Held, on motion to arrest judgment, that the declaration contained a good consideration for the promise.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh divers boilers of the plaintiff of great value, to wit &c., the defendant promised the plaintiff that he the defendant would, within a reasonable time after the said weighing was effected, leave and give up the said boilers in as perfect and complete a condition, and as fit for use by the plaintiff, as the same were in at the time of the consent so given &c. Averment,

1838.

BAINBRIDGE v. FIRMSTON.

that in pursuance of such consent the defendant weighed the boilers; yet that he, not regarding his promise, did not, within a reasonable time &c., return the said boilers in as perfect and complete condition &c., but on the contrary, that he took the same to pieces and left them in a detached condition, whereby the plaintiff had been put to great trouble and inconvenience, and been deprived of the use of the said boilers, and was compelled to expend divers sums in putting the said pieces together. To the damage &c.

Plea: Non assumpsit.

The plaintiff having obtained a verdict at the trial before Lord *Denman* C. J. at the London sittings after last Trinity term,

J. Bayley now moved for a rule nisi to arrest the judgment. There was no sufficient consideration to support the promise. "Every promise, for the non-performance of which an action of assumpsit may be maintained, must be founded on a sufficient consideration, that is, a consideration, either of benefit to the defendant, or of benefit to a stranger, of damage, or of loss, sustained by the plaintiff at the request of the defendant."—1 *Selw.* N. P. (*a*). No action will lie for a mere nonfeasance, unless the promise is founded on a consideration; *Elsee* v. *Gutward* (*b*), and *Bates* v. *Cort* (*c*).

Lord DENMAN C. J.—I think the declaration good. The defendant requests to be allowed to weigh certain boilers belonging to the plaintiff; he can only do so by the plaintiff's permission, in consideration of which he makes the promise alleged; the promise follows as of course. We need not inquire into the nature of the benefit derived to the defendant. The plaintiff may have sustained some damage by complying with the defendant's request, and that is enough after verdict.

(*a*) P. 45, 9th ed.
(*b*) 5 T. R. 143.
(*c*) 2 B. & C. 474; *S.C.* 3 D. & R. 676.

1838.

BAINBRIDGE v. FIRMSTON.

PATTESON J.—It does not appear what the benefit was to the defendant; but at all events there was some detriment to the plaintiff, who it appears parted with the boilers at the request of the defendant.

WILLIAMS J. and COLERIDGE J. concurred.

Rule refused.

Saturday, November 3d.

POZZI *v.* JAMES SHIPTON and MAURICE SHIPTON.

The duty of common carriers to carry safely, is independent of any contract made by them, and no contract need be proved in an action on the case, founded on the custom of the realm. The declaration in case stated, that the plaintiff delivered to the defendants, and the defendants accepted a package, to be taken care of and carried and conveyed from L. to B., and then delivered to *A. B.* for reasonable reward, and thereupon it became the duty of the defendants to take due care &c., in the conveyance of the said package: plea, that the plaintiff did not deliver to the defendants. At the trial the jury found a verdict for one of the defendants and against the other:—Held, that the declaration *might* be read as charging the defendants in tort, on the general custom of the realm, and not on a contract; that the Court were bound so to read it, after verdict, and to support the finding, though against one only of the defendants.

CASE. The declaration stated that on &c., the plaintiff caused to be delivered to the defendants, and the defendants then accepted and received of and from the plaintiff, a certain package, containing a looking-glass, of the plaintiff, of great value, to wit, 10*l.*, to be taken care of and carried and conveyed by the defendants from Liverpool to Birmingham, in the county of Warwick, and there, to wit, at Birmingham, safely to be delivered to one *Peter Pousey*, for the plaintiff, for certain reasonable reward to the defendants in that behalf, and thereupon it then became and was the duty of the defendants to take due care of the said package and its contents, whilst they so had the charge thereof for the purpose aforesaid, and to take due and reasonable care in and about the conveyance and delivery thereof as aforesaid. Yet the defendants, not regarding their duty in that behalf, but contriving and fraudulently intending &c., did not nor would take due care of the said package and its contents aforesaid, whilst they had the charge thereof for the purpose aforesaid, or take due and reasonable care in and about the conveyance and delivery

thereof as aforesaid, but on the contrary thereof, the defendants, whilst they had the charge of the said package and its contents for the purpose aforesaid, to wit, on &c., took so little and such bad and unreasonable care in and about the conveyance and delivery thereof as aforesaid, and so carelessly and negligently conducted themselves in the premises, that the said looking-glass, being of the value aforesaid, afterwards, to wit, on &c., became and was broken and greatly damaged.

Pleas: 1. not guilty; 2. that the plaintiff did not cause to be delivered to the defendants, nor did the defendants accept or receive from the plaintiff, the said package containing the said looking-glass, to be taken care of and carried and conveyed &c., modo et formâ.

At the trial at the Liverpool Summer assizes, 1836, before *Coleridge* J., it appeared that the defendants were canal carriers, under the firm of *Shipton* & Co., at Liverpool, and that the plaintiff had given them a packing case, containing a looking-glass, to be forwarded to "Mr. *Pousey*, Birmingham." On delivery of the package to Mr. *Pousey*, the looking-glass was discovered to be broken, and he refused to receive it. It also appeared from one of the plaintiff's witnesses, that the defendant *Maurice Shipton* never had been in partnership with the other defendant. The counsel for the defendants, upon this evidence, submitted that the plaintiff must be nonsuited, for that although the action was framed in tort, it was founded on a contract, and therefore that both defendants must be fixed; the learned judge reserved the point, and the verdict passed for the plaintiff against the defendant *James Shipton*, damages 9*l.* 9*s.*, and for the defendant *Maurice Shipton*.

Atcherley Serjt., in the ensuing Hilary term, having obtained a rule nisi accordingly, on the ground that it did not appear by the declaration that the defendants were charged as common carriers, and that therefore it was necessary to fix both the defendants on the contract, in respect of which only they were liable,

1838.

POZZI v. SHIPTON and another.

Alexander shewed cause in Easter term last (*a*). The question in this case is important, in consequence of the different views of this Court and the Court of Common Pleas on the subject (*b*). Ever since the decision in *Coggs* v. *Bernard* (*c*), the liability of carriers in cases of this kind has been undoubted, and it sufficiently appears on the face of the present declaration, that the defendants are charged as such. The word "carrier," it is true, is not used in the declaration, but it is alleged that the package was delivered to the defendants to be carried and conveyed from Liverpool to Birmingham, for certain reasonable reward; it is clear, therefore, that the defendants are charged in fact as carriers. In *Bretherton and others* v. *Wood* (*d*), in the Exchequer Chamber, where the defendants below had been charged in case as "the proprietors of a stage coach, for the carriage of passengers for hire," for damage done to a passenger, two of the defendants being found not guilty, and the others guilty, it was contended that judgment could

(*a*) May 3d, cor. *Littledale*, *Patteson* and *Coleridge* Js.

(*b*) In *Govett* v. *Radnidge*, (1802,) 3 East, 62, the gist of the action in a case of this kind was held to be founded on the neglect of a common law duty, and not on the breach of promise, and therefore that in an action on the case, it was not necessary to fix all the defendants. The Common Pleas, in 1806, in *Powell* v. *Layton*, 2 N. R. 365, and *Max* v. *Roberts*, ib. 454, held that the action was founded essentially on a contract, and that whether framed in tort or assumpsit, all the incidents of an action of contract attached. On *Max* v. *Roberts* being brought into the Exchequer Chamber, (1810,) 12 East, 89, a difference of opinion was understood to exist among the judges upon the question, but judgment was not delivered upon the point. The question was again discussed in the King's Bench, in 1810, in *Weall* v. *King*, 12 East, 452, but was not decided. The Court of King's Bench again had the question before them in 1817, in *Ansell* v. *Waterhouse*, 6 M. & S. 385, and adhered to their decision in *Govett* v. *Radnidge*, 3 East, 62. In *Bretherton* v. *Wood* (*d*), in 1821, the question was again raised, and was carried up to the Exchequer Chamber, which Court decided in conformity with *Govett* v. *Radnidge* (*sup.*), but at the same time distinguished *Powell* v. *Layton*, 2 N. R. 365, and *Max* v. *Roberts*, 2 N. R. 454.

(*c*) 2 Lord Raym. 909.

(*d*) 3 B. & B. 54.

not be entered for the plaintiff, inasmuch as the action, though framed in tort, was founded on the contract with all the defendants, and, therefore, that they must all be fixed or none, and the decisions in *Powell* v. *Layton* (*a*) and *Weall* v. *King* (*b*) were relied upon. The contradictory decisions were brought before the notice of the Court, and after time taken to consider, judgment was given in favour of the plaintiff below. The observations of *Dallas* C. J. are conclusive upon the present case: "On the part of the plaintiffs in error, it was contended that the statement of the case in the declaration amounts to a contract, and *that* being so, all the rules which relate to actions founded on contracts must govern; and that it is a rule of law that such actions are joint, and must be maintained against all the defendants named in the declaration, or fail altogether. If it were true that the present action is founded on a contract, so that, to support it, a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion that this action is not so founded, and that on the trial it could not have been necessary to shew that there was any contract, and therefore that the objection fails. This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." Again, "If the action be not founded on a contract, but on a breach of duty depending on the common law, on a tort or misfeasance, it cannot be contended that the judgment is erroneous; for, from the nature of the case and the form of the action, it is several, and not joint, and may be maintained against some only of those against whom it is brought." In *Powell* v. *Layton* (*a*),

(*a*) 2 N. R. 365. (*b*) 12 East, 452.

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and *Max* v. *Roberts* (*a*) the defendants were charged in respect of a breach of contract only, and no common law liability whatever was shewn. But, in the present case, it is only in respect of their common law liability that the defendants are responsible; and there is no averment in the declaration of "special instance and request" on the part of the defendants. If, however, the present case is not to be distinguished from *Powell* v. *Layton* (*b*), the Court will rather adhere to *Govett* v. *Radnidge* (*c*), as was observed by *Bayley* J. in *Ansell* v. *Waterhouse* (*d*). That case is a strong authority for the plaintiff. The defendant was there charged in case as a stage coach proprietor, and he pleaded in abatement that other persons were joint proprietors with him, the defendant. The defendant's liability on the custom of the realm was not set out any more than in the present declaration; but, as here, there was no averment of any contract; and the Court held, that the action was founded on the tort at common law, and therefore that no plea in abatement was admissible. Lord *Ellenborough* C. J. observed, "It is said the defendant is not charged *verbatim* as a common carrier upon the custom; but the declaration is *tantamount*, for it charges him as the proprietor of a common stage coach for hire, and alleges the negligence as a breach of duty arising out of that employment for hire and reward." It is true that the present declaration does not aver that the defendants are carriers or proprietors of a public conveyance, and on special demurrer the omission might perhaps have been held fatal; but it appears in substance on record that the defendants are so charged; they were proved, at Nisi Prius, to be public carriers, and, therefore, on a motion in arrest of judgment, the Court will support the verdict. *Brown* v. *Dixon* (*e*) is an illustration of the soundness of the rule laid down by Lord *Ellenborough* C. J. in *Govett* v. *Radnidge* (*c*). *Brown*

(*a*) 2 N. R. 454.
(*b*) 2 N. R. 365
(*c*) 3 East, 62.
(*d*) 6 M. & S. 385; *S. C.* 2 Chitt. 1.
(*e*) 1 T. R. 274.

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v. *Dixon* (*a*) was trover for a dog; the second count alleged that the plaintiff, at the request of the defendant, delivered a dog to him, to be seen and viewed by him, and to be returned in a reasonable time; yet the defendant, contriving &c., did not return the dog, but through his carelessness lost the same. On special demurrer for joining a count founded on breach of promise, with a count in trover, the Court gave judgment for the plaintiff, and observed that, "wherever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. Assumpsit and tort cannot be joined together, because the pleas to both are not the same. But the whole of this is *case*." [*Patteson* J. That is not the true rule, because debt and detinue may be joined together, although the judgments are different; and again, trespass and case cannot in general be joined, although the same pleas are pleadable, and the judgment in each is for damages and costs. The rule laid down in *Dickon* v. *Clifton* (*b*), was reconsidered in *Mast* v. *Goodson* (*c*).] The cases on this subject are collected in the notes to *Cabell* v. *Vaughan* (*d*), and the rule appears to be clearly laid down there that it is only where the action is not maintainable without proving a contract between the parties, as in *Powell* v. *Layton* (*e*), *Weall* v. *King* (*f*), and *Green* v. *Greenbank* (*g*), that, whether the declaration be in case or assumpsit, all the incidents of an action of contract are applicable. It is true that in *Buddle* v. *Willson* (*h*), the inclination of the Court was, that the nonjoinder of defendants might be pleaded in abatement to an action on the case against carriers, on the custom of the realm, but that case was decided upon another ground; and the doctrine itself, as well as the case of *Boson* v. *Sandford* (*i*), may be

(*a*) 1 T. R. 274.
(*b*) 2 Wils. 319.
(*c*) 3 Wils. 348.
(*d*) 1 Wms. Saund. 291, n. (4) and (*e*).
(*e*) 2 N. R. 365.
(*f*) 12 East, 452.
(*g*) 2 Marsh. 485.
(*h*) 6 T. R. 369.
(*i*) 3 Lev. 258; *S. C.* 2 Salk. 440; 1 Shower, 29.

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considered as overruled by *Govett* v. *Radnidge* (*a*). In *Dale* v. *Hall* (*b*), on which Lord *Kenyon* C. J. relied, in *Buddle* v. *Willson* (*c*), the declaration was in assumpsit, and therefore it is beside the present question. Some reliance will probably be placed on the want of an allegation in the declaration, that the defendants are carriers; but in 1 *Selw.* N. P. 416 (8th ed.), where the question is discussed, it is laid down as the result of the authorities, that the plaintiff may declare in case generally, without alleging the custom of the realm; and that by the statement of the defendants carrying for hire, it would appear that the defendants were common carriers. As the objection in this case was raised at Nisi Prius, if it had not fully appeared there that the defendant *James Shipton* was a common carrier, he would have obtained a verdict also.

Atcherley Serjt. and *Crompton*, contrà. For the last 150 years the current of decisions has been uniform, with the exception of *Govett* v. *Radnidge* (*a*); that, although carriers are liable for a breach of duty by the custom of the realm, their liability is founded on breach of contract. In *Boson* v. *Sandford* (*c*), *Holt* C. J. held expressly that this was not an action *ex delicto*, but *ex quasi contractu*, and it was not the contract of one, but all; that there was no other tort but the breach of trust. This case was much discussed and was confirmed in *Buddle* v. *Willson* (*c*). [*Patteson* J. The decision in that case is a mere dictum, as the plea was bad on another ground.] All the cases are considered in *Powell* v. *Layton* (*e*), where it is shewn that *Boson* v. *Sandford* (*f*) is sound law, and was never questioned till the case of *Govett* v. *Radnidge* (*a*). The principle is, that if a contract be the foundation of the action, the plaintiff shall not, by the adoption of a particular form

(*a*) 3 East, 62.
(*b*) 1 Wils. 281.
(*c*) 6 T. R. 369.
(*d*) 2 Salk. 440.
(*e*) 2 N. R. 365.
(*f*) 3 Lev. 258; *S. C.* 2 Salk. 440; 1 Shower, 29.

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of action, oust the defendant of any advantages he would be entitled to if sued in contract, viz. of pleading a non-joinder of other defendants in abatement, of entitling the defendants to a verdict, if the cause of action should not be proved against all, and of excluding a count in trover. Thus, in *Jennings* v. *Rundall* (*a*) it was held, that an infant, who was sued in case for immoderately riding the plaintiff's mare, might plead his infancy in bar, as the action was clearly founded on a contract. Again, if the contract might be converted into a tort, parties might be made defendants to exclude their evidence; or if one partner may be sued alone on the tort, no contribution would be recoverable; *Merryweather* v. *Nixan* (*b*). [*Coleridge* J. How do you distinguish this case from *Bretherton* v. *Wood* (*c*), except that there the defendants below were alleged to be the proprietors of a common stage coach. Here, it is stated to be the duty of the defendants to carry safely, and facts are shewn to prove what that duty is.] The judgment of *Mansfield* C. J. in *Powell* v. *Layton* (*d*), is relied upon: "The duty of a servant, or the duty of an officer, I understand, but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract." Both in *Bretherton* v. *Wood* (*c*) and in *Ansell* v. *Waterhouse* (*e*), the allegation in the declaration was considered to shew sufficiently, that the defendants were common carriers; but in the present declaration, for all that appears on the face of the record, the defendants had never carried goods before, and were never to carry again. They can only be liable in respect of the plaintiff's loss on their express contract, or on the custom of the realm; the contract has not been proved, and it is unheard of that the custom of the realm can attach to any party whatsoever, who undertakes to convey an article for reward. [*Patteson* J. The question is, whether the words in the declaration necessarily amount to

(*a*) 8 T. R. 335.
(*b*) 8 T. R. 186.
(*c*) 3 B. & B. 54.
(*d*) 2 N. R. 365.
(*e*) 6 M. & S. 385.

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a contract.] If they do not, there is a mere *nudum pactum* alleged, and no duty whatever on the defendants. The decisions in all these cases have turned upon the state of the pleadings. In *Bretherton* v. *Wood* (*a*), although a contract was alleged, a tort sufficiently appeared, which was not necessarily connected with the breach of contract, and therefore it was held that the case was completely within the rule applying to actions of tort; but in all cases of carriers, a contract necessarily exists. [*Patteson* J. That is expressly denied in *Bretherton* v. *Wood* (*a*), and cannot well be, because a carrier is compellable to carry, and may be indicted for refusal.] That may be part of his liability, but if he does carry, that shews his assent to the contract proposed. [*Patteson* J. The objection then may be raised on the record, as the second plea avers that the plaintiff did not deliver to the defendants, and the jury find that he did deliver to one defendant, and not to the other.] The objection also arises at Nisi Prius, for as the contract *is* alleged, it ought to be proved; and as no common law liability is charged against the defendants, evidence on that point is inadmissible. It was impossible for the defendants to traverse their being common carriers; the proof, therefore, of their being carriers, does not obviate the necessity of proving the contract. With regard to *Govett* v. *Radnidge* (*b*), it has often been overruled. Serjt. *Williams* (*c*) considered it to have been expressly so by *Powell* v. *Layton* (*d*). [*Patteson* J. That is rather a bold assertion, for if error had been brought in *Powell* v. *Layton* (*d*), there is no doubt that the Court of King's Bench, in the then existing state of the Court, would have adhered to *Govett* v. *Radnidge* (*b*).] *Green* v. *Greenbank* (*e*) may be also considered to have impugned *Govett* v. *Radnidge* (*b*), and *Weall* v. *King* (*f*), is a decision by the Court of King's Bench,

(*a*) 3 B. & B. 54.
(*b*) 3 East, 62.
(*c*) 1 Wms. Saund. 291, n. 4.
(*d*) 2 N. R. 365.
(*e*) 2 Marsh. 485.
(*f*) 12 East, 452.

at the very time that *Max* v. *Roberts* (*a*) was under consideration in error, and is completely in accordance with the decisions of the Common Pleas. *Marzetti* v. *Williams* (*b*) and *Godefroy* v. *Jay* (*c*), are two recent decisions, in which the Courts have fully recognized the principle, that if a contract be the basis of the action, all the incidents of the contract apply, although the declaration may be framed in tort.

Cur. adv. vult.

Patteson J. now delivered the judgment of the Court.—This is an action against carriers for negligence. A verdict was found for the plaintiff against one of the defendants only, and upon a rule for a nonsuit having been obtained, the case was argued in the last Easter term, before my brothers *Littledale*, *Coleridge*, and myself.

The form of the declaration is in case, and differs from that used in *Bretherton and others* v. *Wood* in error (*d*) in this, that it contains no positive averment that the defendants were carriers; whereas in *Bretherton and others* v. *Wood* (*d*) there was an averment that the defendants were proprietors of a stage coach, for the carriage and conveyance of passengers for hire, from Bury to Bolton. The present declaration states simply that the plaintiff delivered to the defendants, and the defendants received from the plaintiff, goods to be carried for certain reasonable reward from A. to B. It is therefore consistent with the defendants being common carriers, or being hired on the particular occasion only. Upon the trial it was proved satisfactorily, that the defendant, against whom the verdict was found, was a common carrier, and it does not appear to have been objected at that time, that proof of an express contract between the plaintiff and the defendants was necessary, in order to sustain the declaration. If such proof was not necessary, it

(*a*) 2 N. R. 455; *S. C.* in error 12 East, 89.

(*b*) 1 B. & Ad. 415.

(*c*) 7 Bingh. 513.

(*d*) 3 B. & B. 54.

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can only be because the declaration may be read as founded on the general custom of the realm, and if it *may* be so read, the Court, after verdict, *must* so read it, and then the case of *Bretherton and others* v. *Wood* (*a*) is directly in point in favour of the plaintiff. Upon consideration, we are of opinion that the declaration may be so read. The practice appears to have been in former times, to set out the custom of the realm, but it was afterwards very properly held to be unnecessary so to do, because the custom of the realm is the law, and the Court will take notice of it, and the distinction has for many years prevailed between general and special customs in this respect. Afterwards the practice appears to have been to state the defendants to be *common carriers for hire.* That however was departed from in *Bretherton and others* v. *Wood* (*a*), to a considerable extent, and certainly still further upon the present occasion. It may be that the present declaration could not have been supported on special demurrer for want of some such averment, but on this point we are not called upon to give any opinion. It does not state that the goods were delivered to the defendants, at their special instance and request, or contain any other allegation necessarily applicable to an express contract only, or even pointing to any express contract. We cannot therefore say that it shews the action to be founded on contract, and it is sufficient for the present purpose, if the language in which it is couched is consistent with its being founded on the general custom as to carriers.

Taking this declaration therefore to charge the defendants as common carriers, it follows that it is strictly an action on the case for a tort, and that one of several defendants may be found guilty upon it, according to the doctrine established in *Bretherton and others* v. *Wood* (*a*). The evidence warrants the verdict which has been found, and we cannot disturb that verdict. We purposely abstain from giving any opinion, whether the doctrine in *Govett* v.

(*a*) 3 B. & B. 54.

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Redridge (*a*), or that in *Powell* v. *Layton* (*b*), be the true doctrine, as we do not feel ourselves called upon to decide between them, supposing them to differ. The rule must be discharged.

Rule discharged.

(*a*) 3 East, 62. (*b*) 2 N. R. 365.

COOPER *v.* LAWSON.

Monday, Nov. 5th.

LIBEL. The declaration set out, as the libel complained of, an article in the Times newspaper of the 29th December, 1837. This article purported to give an account of certain proceedings in a committee room of the House of Commons, upon taking the recognizances under a petition presented against the return of the sitting members of the borough of Berwick, when the plaintiff tendered himself and was accepted as one of the sureties for the petitioners, in the sum of 500*l.* It purported to give at length the affidavit made on this occasion by the plaintiff as to his sufficiency, and also counter-affidavits by persons, stating themselves to be his creditors, as to his insufficiency, deposing to various facts and transactions for the purpose of shewing that he was in an insolvent state. It then added the following observation, among others :—" But why, may it be asked, does this cockney tailor (meaning the plaintiff) take all this trouble, and subject himself to all this exposure of his difficulties and embarrassments. He has nothing to do with the borough of Berwick-upon-Tweed, or its members. How comes it then that he should take so much interest in the job? There can be but one answer to these very natural and reasonable queries—*he is hired for the occasion;* the

Where a plea to an action of libel justifies that the facts charged against the plaintiff are true, and the comments bonâ fide, it is properly left to the jury to consider, not only whether the facts are proved, but whether also the comments are bonâ fide, if they are of themselves actionable, and are not necessary inferences from the facts. Under such a justification of a libel, imputing to the plaintiff, that he had become surety for 500*l.* on an election petition, although he was at the time in

insolvent and insufficient circumstances, and adding, he was hired for the occasion; the observation that he was hired, whether taken as a statement of a distinct fact or a mere comment, is itself actionable, and the jury are to decide whether it is covered by evidence justifying the rest of the libel.

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affair is in fact a foul job throughout, and it is only by such aid that it can possibly be supported."

Pleas: 1. Not Guilty. 2. Justification. That the statements and matters contained in the affidavits (set out in the newspaper and plea relative to the insufficiency of the plaintiff) were correct and true in every respect; that the plaintiff, at the time of making his aforesaid affidavit, was not fit to become surety; that the said affidavits were proceedings publicly taken before a legal Court and jurisdiction competent to entertain and determine on the same; that the matter charged as libellous was a fair account of the said proceedings, with a fair and bonâ fide commentary thereon, published without malice.

Replication: joining issue on the first plea, and of *de injuriâ* to the second.

At the trial, before Lord *Denman* C. J., at the London sittings after the last Trinity term, evidence was given by the defendant of the truth of all such facts in his plea of justification, as tendered to shew the insolvency and insufficiency of the plaintiff. His lordship left the whole case to the jury, directing them to find a verdict for the plaintiff, if they believed that the facts alleged against him had not been proved, or that the commentaries on them were not fair and bonâ fide. Verdict for the plaintiff.

Sir *J. Campbell* A. G., now moved for a new trial, on the ground of misdirection. The plea in this case justified the absolute verity of the statements of fact in the libel, and also the fairness of the comments; but the plea would have been good without the latter allegation. Such allegation, therefore, was quite immaterial, and it ought not to have been left to the jury to consider whether it was proved. This is not a plea that the account of proceedings at a trial is correct, and the comments on them fair, but that the facts themselves are true. The inference from those facts did not require to be justified. [*Coleridge* J. The libel says

the plaintiff was hired.] That is mere inference. If, in an action of libel for publishing of the plaintiff that he had committed parricide, and was a disgrace to human nature, a plea were framed as in the present case, justifying the bona fides of the observation as well as the statement of fact, it would be enough to prove the mere fact that the plaintiff had committed parricide. The defendant proved all the facts alleged in the libel. [Lord *Denman* C. J. The commentary that the defendant was hired, involves a new fact. *Patteson* J. Suppose the declaration had complained of the comment alone, would it have been enough to have pleaded that it was made upon certain facts, and that those facts had actual existence?] If an action were brought for saying that a man ought to be transported, it would be enough to shew that he had been guilty of a transportable offence. In *Clarke* v. *Taylor* (*a*) the libel contained matter of observation as well as statement; the statement only was justified, both in the plea and at the trial; and the Court refused to enter a verdict for the plaintiff on those parts of the libel to which there was no justification.

PATTESON J.—The authority of *Clarke* v. *Taylor* (*a*) is the only thing that raised the slightest doubt in my mind upon this question, but on referring to that case I find that it is not at all in point. The libel there consisted of a long newspaper paragraph, the concluding part of which was not covered by the plea of justification; and *Tindal* C. J. observes, "there can be no doubt that a defendant may justify part only of a libel containing several distinct charges;" and afterwards adds, "but if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has so omitted to justify. The plea in the present instance does not affect to justify the whole of the publication, and we are to see whether the part omitted would, by itself, form a substantive ground of an action of libel." Apply that test here: suppose the

(*a*) 2 Bing. N. C. 654.

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plea had omitted to justify the observation, that the plaintiff "was hired for the occasion," it would not have met the whole declaration, for the comment itself was libellous. I do not say that in all cases of libel, where certain facts are commented on, it should be left to the jury to say whether they have been commented upon fairly. But, wherever the comment involves an imputation, which may or may not be a just inference from facts, it may then be a distinct libel, and the jury are to ascertain its character. In the instance put by the Attorney-General, the inference from a man's being a parricide that he is a disgrace to human nature is a necessary inference, which it would be absurd to leave to the jury. I think the defendant acted wisely in justifying the comment in his plea, and that he should have proved the truth of it at the trial.

WILLIAMS J.—The Attorney-General assumed in argument that the comment did not add to or vary the imputation contained in the libel. Now it was said that the plaintiff must have been induced by hire to become surety, and the motives thus imputed to him, while in a state of ambiguous solvency, were, it appears to me, if rightly imputed, conclusive as to the character of the transaction proved.

COLERIDGE J.—The charge here is not only that the plaintiff was hired, but that he was perjured. Undoubtedly, in many cases there could be nothing for a jury to deliberate upon where facts had been proved, and the comments upon them passed over, for the comments might be necessarily true, but in this case the comments involved a new fact.

Lord DENMAN C. J.—It would be extravagant to say that in cases of libel every comment should be justified, although it might be nothing but a mere shadow of the libel, and inseparably connected with it. But where from one fact the defendant has chosen to infer another, the jury are to

say whether the comment is fair. The defendant had no right to say that the plaintiff, whose circumstances were doubtful, had been hired.

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Rule refused.

GROOM and others, Assignees of RAVEN, a Bankrupt, *v.* WEST.

Friday, November 9th.

A declaration that, in consideration that *R.*, before his bankruptcy, would sell certain goods to defendant, defendant agreed to pay for the same prompt two months, or by an acceptance, containing an averment of delivery of the goods, and of the defendant's refusal to pay by an acceptance or otherwise, whereby *R.*, before he became a bankrupt, was deprived of the use and benefit of an acceptance, and of all the benefit which would have resulted from discounting

DECLARATION; that heretofore, and before the said *Raven* became a bankrupt, to wit, on the 23rd June, 1835, in consideration that *Raven*, at the request of the defendant, would sell and deliver to the defendant a certain quantity, to wit, five hogsheads of Demerara sugar, at a certain price then agreed upon between them, *Raven* and defendant, to wit, at the price of 2*l.* 15*s.* for each hundred weight of the said sugar, amounting in the whole to the sum of 175*l.* 0*s.* 4*d.*, he, defendant, promised *Raven* to accept the said sugars and pay him for the same in manner following; that is, prompt two months, or an acceptance, that is to say, of a bill of exchange for the amount thereof, payable 70 days after the date of such bill, if such acceptance should be required by said *Raven*, the said seller of said sugars. Averment, that *Raven*, confiding in the promise of defendant, did afterwards, and before he became bankrupt, sell and deliver the said quantity of goods to defendant on the terms aforesaid, and defendant then accepted the same; and that although *Raven* afterwards, and before he became bankrupt, to wit, on the 1st July in the year aforesaid, required defendant to pay him for the said sugars by an acceptance, according to the terms of the said sale, yet

the said acceptance, and was put to great loss and inconvenience, and his estate, applicable to the discharge of his just debts, was by reason of the non-payment for the said goods, much diminished in value—does not sound in unliquidated damages so as to deprive the defendant of his right of set-off under the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 50.

Quære, Can injury arising to a creditor from non-payment of a debt form the subject of special damage? *Semble*, per *Coleridge* J. that it can.

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defendant, not regarding his promise, but contriving &c. to defraud *Raven* before he became a bankrupt, and plaintiffs, as assignees as aforesaid, since *Raven* became a bankrupt, did not nor would, when he was so required as aforesaid, or at any time before or afterwards, pay *Raven* before he became a bankrupt, or the plaintiffs as assignees as aforesaid, the price of the said goods, or any part thereof, by an acceptance or otherwise howsoever, but has hitherto wholly neglected &c., and by reason thereof *Raven*, before he became a bankrupt, lost and was deprived of the use and benefit of an acceptance of and by defendant for the said price of the said sugars, and of all the benefit and advantage which would have resulted and accrued to him by having the said acceptance discounted, and raising money thereby for his use and accommodation, in the way of his trade and business; and thereby also was put to great loss, and trouble, and inconvenience, by reason of not having the said bill to negotiate, and his personal estate and effects, applicable to the discharge of his just debts, were thereby, and by reason of the non-payment of and for the said goods in manner aforesaid, much diminished in value, to the great damage of plaintiffs as assignees as aforesaid, and of the creditors of *Raven* seeking relief under the said fiat in bankruptcy, in and under which the plaintiffs were and are assignees as aforesaid.

The second count—after reciting that before *Raven* became a bankrupt he had sold and delivered to the defendant five other hogsheads of sugar, to be paid for prompt two months, or by an acceptance of a bill of exchange, 70 days after date, if required by *Raven*; that he had also sold and delivered on two other occasions other goods respectively agreed to be paid for on delivery, and that *Raven* had required to be paid for the said sugar by an acceptance, but that such acceptance had not been given, nor had the sugar been paid for in any way whatever, and that the other goods, although delivered, had not been paid for—stated, that thereupon and before the bankruptcy of *Raven*,

it was agreed upon between *Raven* and defendant, that the whole of the said goods so sold and delivered should be paid for by an acceptance by defendant of a bill of exchange for the aggregate amount; that thereupon, in consideration of the premises, and that *Raven*, at the request of defendant, would accept such bill in payment for the whole of the said goods, defendant promised to accept a bill for such amount. Averment, that although *Raven* consented to accept such acceptance as last aforesaid in payment &c., and requested defendant to pay him by such acceptance, yet defendant, not regarding &c., but contriving &c., would not pay *Raven* before the bankruptcy, or the assignees since, by such acceptance &c. Then followed an allegation of damage, precisely as in the first count, except that the estate of the bankrupt was stated to have been diminished by means "of the premises," as well as "of the non-payment of and for the said goods."

Sixth plea. That before and at the time of the date and issuing of the fiat in bankruptcy, under and by virtue of which *Raven* was adjudged to be such bankrupt, to wit, on &c., *Raven* was indebted to defendant in 1000*l.*, for goods sold &c., and money lent &c. That defendant had not, when he gave credit to *Raven* in respect of said sum of money &c., notice of any act of bankruptcy by *Raven* committed; which said sum of money so due and owing &c., exceeds &c.; concluding with an offer of set-off.

Special demurrer, for that the plaintiffs have complained against defendant, not merely for the non-payment of debts, or liquidated demands, but for damages sustained by *Raven* before he became a bankrupt, and by the plaintiffs as assignees as aforesaid, by reason and in consequence of *Raven* having, before he became a bankrupt, by reason of the refusal of defendant to pay for the said several goods in the declaration mentioned by acceptances, been deprived of the use and benefit of such acceptances, and each of them, and of the benefit and advantages which would have resulted and accrued to him by having the said

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acceptances discounted, and raising money thereby for his use and accommodation in the way of his trade and business, and having been put to great loss, trouble, and inconvenience, by reason of not having the respective bills in the declaration mentioned to negotiate, and which might and may have been the cause of his bankruptcy; and for damage done to the personal estate of said *Raven*, applicable for the discharge of his just debts, and the claims of plaintiffs, as assignees as aforesaid, sound in damages which are unliquidated, and the amount of which rests with a jury to be established by evidence given to and before such jury, and to which, therefore, a plea of set-off of a debt due by *Raven* to defendant, could not nor can be pleaded.

2. For that it is not stated, alleged, or shewn in the said last plea, that there was any mutual credit between *Raven* and defendant, before or at the time of making the several contracts mentioned in the declaration, but on the contrary thereof it appears, in and by said declaration, that the several goods therein respectively mentioned were to have been paid for by defendant, by acceptances to be immediately given by defendant to *Raven*, and which he might negotiate and get discounted for the purposes of his trade and business, and each of the dealings and transactions in the declarations mentioned was a distinct, separate, and independent dealing and transaction, made and effected as such, and not with reference to the general state of accounts, debts or credits, or any mutual credit between *Raven* and defendant.

3. That it is not stated or alleged in or by said last plea that, at the time the contracts in the declaration mentioned were made and entered into by *Raven* and defendant, *Raven* was indebted to the defendant, and his becoming so subsequently to the breaches by defendant of the special contracts and promises mentioned in the declaration, or either of them, and which ought to have been immediately fulfilled by defendant, can be no answer to a breach or

breaches of such contract at the respective periods at which such breaches were respectively committed.

4. That when goods are sold on a contract to be paid for in a particular way or manner, and the purchaser undertakes to pay for them in such particular way or manner, he cannot of his own authority, and without the assent of the seller, substitute another different mode of payment for the same; and yet defendant has, in and by his said last plea, attempted to substitute a mode of payment of and for the several goods mentioned in the declaration, different from that contracted for, and more prejudicial to the interest of the seller, but has not averred or shewn that such substitution was with the assent of the said seller of the said several goods in the declaration mentioned, or of the plaintiffs as his assignees.

5. That a plea of set-off is given by statute, and it is not averred or shewn in or by the said last plea that the same is pleaded, or that the defendant claims the benefit thereof, according to or by virtue of the statute in such case made and provided: and also for that the said last plea is in various other respects defective, insufficient and informal.

For the defendant, the point set down for argument in the demurrer books was, that set-off could be pleaded to the claim in the declaration, and that each count in the declaration was bad, for not averring a tender of the bill to be accepted by the defendant.

Sir *F. Pollock* (with whom was *Ball*), in support of the demurrer. One of the principal grounds of demurrer is that, where a particular mode of payment is agreed upon between the parties to a sale, it is not competent to the purchaser to vary such mode of payment without the seller's assent. If the law were otherwise, a person holding the overdue acceptance of his embarrassed debtor might obtain goods from him when on the eve of his bankruptcy, under pretence of paying for them by money or otherwise, and then claim to set off the overdue acceptance, in fraud

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of other creditors. *Fair* v. *M'Iver* (*a*) is not an authority on the present point, but may be cited to shew the disposition of the Courts to repress all fraudulent contrivances for getting 20*s.* in the pound from the estate of a bankrupt. There the holders of the acceptance of a trader, who was known to be in embarrassed circumstances, agreed with the defendants to indorse it to them, and that they should purchase goods of the trader, to be paid for by bill at three months (before which time the trader's acceptance would become due): the defendants accordingly purchased goods to be paid for in three months, but without communicating to the trader that they were the holders of his acceptance; and it was held on his bankruptcy that, his assignees having brought assumpsit to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance. [*Patteson* J. We have not before us, as in that case, the facts to constitute fraud.] Fraud might have been replied in this case, but the facts apparent on the record in its present shape are sufficient to shew that the defendant has endeavoured to avail himself of a set-off by a wrongful act, and the Court will notice them ex officio. Where goods are sold to be paid for by ready money or a bill, all intention of mutual credit is excluded. There was no mutual credit in this case, so as to be the subject of set-off within the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 50 (*b*). Suppose there had been

(*a*) 16 East, 130.

(*b*) That section enacts "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to, or the debt contracted by him; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate: provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

an express contract in this case, that the defendant should give *Raven* a bill for the goods, that the transaction should be deemed to be separate and independent of all other transactions between the parties, and that it should not be a subject of mutual credit, would it then have been open to the defendant to meet this claim by a set-off? Yet the actual contract is, in substance, though not in terms, identical with the one supposed. In *Rose* v. *Sims* (*a*), the bankrupt having given defendant, before his bankruptcy, his acceptance for 20*l.*, defendant, in consideration thereof, undertook that he would indorse to the bankrupt a bill drawn by him (defendant) on a third person. He gave the bill, but would not indorse it; and on assumpsit brought by the assignees of the bankrupt, whose acceptance was dishonoured, it was held that the contract to indorse was not a subject of mutual credit within the bankrupt laws. [*Patteson* J. I have great difficulty in understanding, where goods are sold to be paid for by a bill, how it can be said that credit is not given to the buyer. In the case just cited, *Taunton* J. says, "a mutual credit may be said to exist where there is a debt, or something which will end in a debt." Is it not so in the present case?] No: this would not necessarily end in a debt; the bill to be given was in the nature of goods, the transaction may be considered not as one of sale but a barter of the goods for the bill. Besides, this is not an action for the goods sold, but for a breach of contract to accept a bill, and special damage is recoverable, but that point will be insisted on in another part of the plaintiffs' argument. In *Rose* v. *Sims* (*a*) the defendant was to indorse a bill drawn on a third person, here the defendant was to give his own acceptance; but the principle is the same, whether one sort of bill or another is to be given, and that principle is, that the buyer of goods is not at liberty to deviate from his special contract with reference to the particular transaction. In *Key* v. *Flint* (*b*), a party pre-

(*a*) 1 B. & Ad. 521. (*b*) 8 Taunt. 21.

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viously to his bankruptcy deposited a bill of exchange with the defendant, for the purpose of raising money upon it; and the assignees were allowed to recover the amount of the bill from the defendant, notwithstanding a general balance remained due to him from the bankrupt; *Dallas* J. observing, in his judgment, "mutual credit must mean mutual trust; now this attempt of the defendant appears to me a gross breach of trust. The bill of exchange which forms the subject of the present action was entrusted to the defendant for a specific purpose, with an express understanding that it was not to go into the general account." *Rose* and *Hart* (*a*) and *Buchanan* v. *Findlay* (*b*), are similar cases, and illustrate the position that there is no mutual credit, where parties have specially agreed that a particular transaction shall be isolated from the rest of their dealings, and from the general account between them.

The other principal ground of demurrer is, that the plea of set-off is pleaded to a claim for unliquidated damages. The plaintiffs by their declaration do not complain simply of the defendant's non-payment of the goods, but that in violation of his agreement he refused to give his acceptance, and that the bankrupt's estate has consequently sustained great prejudice. [Lord *Denman* C. J. Can there be any damage here, of which the non-payment of the amount due would not be the exact measure?] The bankrupt may have made a forced sale of the goods at a great sacrifice, for the purpose of retrieving himself from his embarrassment, and the non-acceptance of the bill may have been the very cause of his bankruptcy. The declaration contains an allegation of special damage, so as to distinguish this case from *Gibson* v. *Bell* (*c*), which will be relied on for the defendant. In that case it was held, that the defendant might set off a debt due to him from a bankrupt, against a claim by the bankrupt's assignees upon defendant for not accepting a bill pursuant to agreement, by way of payment for goods

(*a*) 8 Taunt. 499.
(*b*) 9 B. & C. 738; *S. C.* 4 M. & R. 593.
(*c*) 1 Bing. N. C. 743.

sold to him by the bankrupt. The correctness of that decision might, perhaps, be impugned, but it is not necessary that it should be, as there the declaration did not allege special damage, and the goods had been delivered previously to the agreement to accept the bill, so that it was to be accepted for an antecedent debt, and was not the stipulated mode of payment for those particular goods.

With regard to the objection that the declaration does not aver any tender of the bill for defendant's acceptance, it is stated that he was required to accept, which is in substance sufficient, though it might be open to a special demurrer, and is at all events cured by the defendant having pleaded over.

Bramwell (with whom was *Kelly*), contrà. The Court cannot say there was fraud in this case. The argument that the contract was broken in order to plead a set-off, would apply to every case of set-off; for until a contract is broken by defendant, he can have no opportunity of pleading a set-off. [Lord *Denman* C. J. We cannot treat this as a case of fraud.] Nor can the demurrer be sustained on the ground that the defendant's set-off would substitute a different mode of payment from that agreed on. It is not at all necessary that *Raven* should have been indebted to the defendant, as contended for in the demurrer, at the time of the contract in the declaration. In most cases where set-off is allowed, the defendant has broken his contract, and he exonerates himself by matter subsequent. In *Hankey* v. *Smith* (*a*), it was laid down by *Buller* J. that, "in order to constitute mutual credit, it is not necessary that the parties mean particularly to trust to each other in that transaction." In that case *A.*'s acceptance came to the hands of *B.*, and *A.* sold him goods without knowing him to be the holder of such acceptance; and yet it was held that there was mutual credit between them.

The other ground of demurrer insisted on is, that the

(*a*) 3 T. R. 507, n.

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plaintiffs' demand being for unliquidated damages cannot be encountered by a set-off; but the language of the 6 *Geo.* 4, c. 15, s. 50, is comprehensive enough to include the present case; it speaks not only of "mutual credit," but says that, "one debt *or demand* may be set off against another." Demand is a word of very large signification; "the most beneficial release which a man can have, is a release of all demands:" *Com. Dig.* (*a*). The demand against the defendant for his acceptance in payment of the goods sold was a debt, which would have been proveable against his estate if he became bankrupt; *Forster* v. *Surtees* (*b*); and if so, it is the subject of set-off. This case has not been distinguished from *Gibson* v. *Bell* (*c*); here also, according to the second count, the acceptance was to be given for an antecedent debt, though that circumstance is immaterial. And the allegation of special damage, that the bankrupt lost the use of the bill, and the argument that he may have become bankrupt in consequence, would apply as well to a count for goods sold and delivered; for if the loss of a bill, on which money may be raised, be a probable cause of bankruptcy, *à fortiori* the non-payment of money must be. Nothing could be recovered under this allegation, which would not also be recoverable under a common breach in a declaration for goods sold and delivered. Nor can it be shewn that this was a case of barter of the goods for the acceptance; the declaration throughout treats the acceptance as the stipulated mode of "*payment*." The authority of *Gibson* v. *Bell* is not at variance with *Rose* v. *Sims* (*d*), for the defendant's undertaking, in the latter case, to indorse a bill on which another party would be primarily liable, was not the subject of an immediate credit to the defendant; but here the contract is, that the defendant should give his own acceptance.

The declaration is bad. It ought to have averred, that *Raven* drew and tendered a bill to the defendant to accept;

(*a*) Tit. Release (E), citing Lit. s. 508.

(*b*) 12 East, 605.

(*c*) 1 Bing. N. C. 743.

(*d*) 1 B. & Ad. 521.

Reed v. *Mestaer* (*a*). [*Coleridge* J. Is not the tender of the bill substantially averred? *Patteson* J. If you had traversed the requisition of the acceptance, could the plaintiff have satisfied his averment by proof of any thing short of a tender of the bill for acceptance?] After this intimation it is unnecessary to press the point, for there is a plea traversing the requisition of the defendant's acceptance, and they will not now contend at the trial, that their averment can be proved by any thing short of the tender of a bill.

Sir *F. Pollock*, in reply. *Hankey* v. *Smith* (*b*) has been cited for the defendant, but it only shews that, where there is a general dealing between parties, mutual credits may arise, although neither intended nor anticipated. Here, however, the language of the contract is in substance, that there shall be no mutual credit. In *Thorpe* v. *Thorpe* (*c*), *Parke* J. in his judgment makes this observation, which applies strongly in favour of the present plaintiff: "If the plaintiff had chosen, instead of assumpsit for money had and received, to bring a special action for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages." [*Patteson* J. Has *Eland* v. *Karr* (*d*) ever been overruled? There the defendant had agreed to pay ready money for goods, and yet was allowed his set-off.] The declaration there was for goods sold and delivered, and the replication of the special contract to pay ready money, by way of answer to the plea of set-off, was of course bad as a departure. [*Bramwell* mentioned *Clarke* v. *Fell* (*e*) as an authority which appeared to conflict with *Eland* v. *Karr*. Lord *Denman*, C. J. Lord *Ellenborough* C. J., in *Fair* v. *M'Iver* (*f*), says he defers to the authority of *Eland* v. *Karr*, but is not convinced by it.] Here the claim against the defendant might or might not end in a debt, according

(*a*) Com. on Contracts, 181, 2nd ed.
(*b*) 3 T. R. 507, n.
(*c*) 3 B. & Ad. 580.
(*d*) 1 East, 375.
(*e*) 4 B. & Ad. 404.
(*f*) 16 East 130.

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to the option of the vendor, and therefore *Rose* v. *Sims* (*c*) applies.

Lord DENMAN C. J.—The declaration in this case charges the defendant with a breach of his agreement to pay for goods, purchased from the bankrupt, by prompt two months or by an acceptance, and alleges that, in consequence of such breach, damage has accrued to the bankrupt's estate. The only question important for us to consider is, whether, against the claim so declared upon, a debt due from the bankrupt to the defendant can be set off. I am clearly of opinion that there has been a mutual credit within the meaning of the Bankrupt Act, between these parties, and that the stipulated mode of payment for the goods is not material. That principle has been acted upon in *Forster* v. *Surtees* (*a*), *Gibson* v. *Bell* (*b*), and is not at all impugned by the decision in *Rose* v. *Sims* (*c*). An observation, by *Parke* J., in *Thorpe* v. *Thorpe* (*d*), that, "if a special action had been brought for the breach of duty, there could have been no set-off, because it would have been an action for unliquidated damages," has been relied upon for the plaintiffs. That case, however, was altogether different. The plaintiff had intrusted the defendant with a bill of exchange, to be paid over to a third person, and the defendant, instead of so paying it over, discounted it and retained the proceeds. The transaction itself, independently of the defendant's breach of duty, had no tendency to terminate in a debt from him to the plaintiff; but the plaintiff, instead of bringing an action, which would undoubtedly have sounded in damages for the breach of duty, chose, as the same learned judge adds, to bring assumpsit for money had and received, and to let in the consequences of that form of action, one of which is, the right of set-off. That was like the case of a carrier appropriating to payment of his own debt, a bill confided to him in the way of his

(*a*) 12 East, 605.
(*b*) 1 Bing. N. C. 743.
(*c*) 1 B. & Ad. 521.
(*d*) 3 B. & Ad. 580.

business to convey to another person. This declaration does not contain any allegation of special and unliquidated damages, and I am of opinion that the case itself would not admit of any such allegation. I question whether mere pecuniary loss can be considered such special damage as not to be properly met by a plea of set-off. No doubt the damage arising to a creditor from the non-payment of a debt due to him is often very heavy, but it is bounded, in law, by pecuniary loss.

PATTESON J.—I am of the same opinion. It has been contended that great inconvenience will ensue from allowing this plea, and that the Court will thereby lend its sanction to fraud, which it is bound to repress. I know nothing of any fraud in this case. None is alleged on the record, to which, on demurrer, we ought to confine ourselves most strictly. If once we depart from the record, I know not what mischief may follow; on demurrer to an indictment for murder, facts might be assumed, of which the consequences would be most serious. I exclude, therefore, all supposition of fraud, as none is alleged on the record.

The question is, was there not a mutual credit between the bankrupt and defendant, so as to let in the set-off? It is hardly possible, I think, under any circumstances where goods are sold to be paid for by bill, to say that credit is not given to the purchaser. What sort of credit, is another matter; but credit it is of some sort. I agree that, if goods or money are sent to a man for a specific purpose, he cannot alter the situation of the sender, and make that a debt which was meant for a trust. *Buchanan* v. *Findlay* (*a*), and several other cases cited, proceed on that principle. Now to apply the test, which is given more fully by *Taunton* J. in *Rose* v. *Sims* (*b*), than in any other case, that "a mutual credit may be said to exist where there is a debt

(*a*) 9 B. & C. 738; *S. C.* 4 M. & R. 593.

(*b*) 1 B. & Ad. 521.

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or something which will end in a debt;" suppose the defendant gave his acceptance for the goods purchased, he would be a debtor on the bill; and suppose he did not, then he would be a debtor for the price of the goods. In *Rose* v. *Sims* (*a*), the agreement was to indorse the bill of *another person*, so that the defendant would have been merely a surety, and it was not at all necessary that his undertaking should end in debt. Then we have the authority of *Gibson* v. *Bell* (*b*), which is on all-fours with this case; but it has been attempted to distinguish them, on the groundthat here special damage is alleged. That leads to the question whether there is any special damage alleged. The declaration states that the defendant did not pay *Raven* before he became a bankrupt, or the plaintiffs, as assignees, the price of the goods, by an acceptance or otherwise, and, " by reason thereof, the said *Raven*, before he became a bankrupt, lost and was deprived of the use and benefit of an acceptance of and by defendant for the price of the said sugars, and of all the benefit and advantage which would have resulted and accrued to him by having the said acceptance discounted, and raising money thereby for his use and accommodation in the way of such trade and business, and thereby also was put to great loss, trouble and inconvenience, &c." What then is the special damage? It cannot be personal damage and inconvenience to the bankrupt, for that would not pass to his assignees. It must be damage to his estate, and how that has been specially injured I do not understand, except that the defendant's breach of contract has let in the set-off: but that cannot be the damage intended; it must be damage at the time of the breach. The allegation is very general, that damage has been sustained, but it is not said *how*. It is the allegation of such ordinary and necessary damage as arises from non-payment; and if that is to exclude a set-off, a set-off may always be excluded by adding to the declaration a few general words, by way

(*a*) 1 B. & Ad. 521. (*b*) 1 Bing. N. C. 743.

of allegation, that the plaintiff has sustained damage consequential from the defendant's non-payment to him of the debt sued for. If goods are purchased, to be paid for at six months, and they are not paid for, the estate of the seller is just as much injured as if default were made to pay by a bill at that date. If the defendant has no right of set-off, we should be bound to say, that the claim in the declaration could not be proved under a fiat against him, if he were a bankrupt, and that his certificate would be no bar.

WILLIAMS J.—It is admitted that this case is not distinguishable from *Gibson* v. *Bell* (*a*), unless by the allegation of special damage. This declaration, it is true, may appear to sound in damages, yet substantially it discloses a mere money transaction, and nothing else. It is stated that the bankrupt's estate was diminished by the defendant's breach of contract, but not in what manner, and the whole allegation is vague and indeterminate.

COLERIDGE J.—I quite agree with my brother *Patteson*, that we should adhere to the pleadings, and not allow ourselves to be influenced by any thing that does not appear on them. At the same time I think that special damage might accrue from the breach of such a contract as the plaintiff has declared upon, and that, if properly charged and alleged, it might shew that the commissioners could not take the account so as to satisfy both parties. If that appeared, the case would not be within the act. But the damage here is not properly charged; every thing is stated generally; no information is given to the defendant of any special loss, the reality of which might be inquired into, and if special damage were attempted to be proved at the trial, it would not be admissible under this allegation. I am of opinion that there was a mutual credit between these parties, and whether the defendant gave a bill or not, the credit was, in either alternative, such as would end in a debt.

Judgment for defendant.

(*a*) 1 Bing. N. C. 743.

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FEW *v.* BACKHOUSE.

COVENANT on an annuity deed bearing date 15th June, 1832, by which the defendant granted to the plaintiff an annuity of 114*l.* per annum for 95 years, if defendant should so long live. Breach, non-payment of two years of the annuity due on the 15th June, 1834.

1. To a count in covenant on an annuity deed, with a breach for non-payment of the annuity on 15th June, 1834, the defendant pleaded a judgment recovered against him by plaintiff in an action of debt, for the sum of 2000*l.*, of Easter term, 1832; concluding with an averment, that the causes of action in the two suits were identical:—Held, a bad plea, on general demurrer.

2. When a nominal consideration of 10*s.* is expressed in an annuity deed to have been paid to a surety, it need not be stated in the memorial under 53 *Geo.* 3, c. 141, s. 2.

Pleas: 1. After setting out the deed upon oyer, (from which it appeared that 1000*l.* had been paid to the defendant as a consideration for the annuity, *and a nominal consideration of* 10*s. also* to a third person as surety,) that plaintiff heretofore, to wit, in Michaelmas term, 1832, in the Court of our said Lord the King, before the King himself, impleaded the defendant in an action of debt of 2000*l.*, for the very same identical causes of action as are in the said declaration abovementioned, and such proceedings were thereupon had in the said action, that afterwards, to wit, in the same Michaelmas term, in the year aforesaid, the plaintiff, by the consideration and judgment of the said Court, recovered in this action against the defendant 2000*l.* debt, and also 65*s.*, as well for the damages which he had sustained by reason of the detention of the said debt (being the same causes of action as in the said declaration mentioned), as for his costs and charges &c., whereof the defendant was convicted, *prout patet per recordum*, and which said judgment is in full force, and unanswered and unsatisfied; with this, that the said causes of action in the said judgment so had and obtained, are the same causes of action as the causes of action in the said declaration mentioned. Verification. The second plea alleged that no memorial of the grant of the annuity &c. had been inrolled. Verification.

Replication to the first plea: That the causes of action in the declaration mentioned were not the same identical causes of action as in the first plea mentioned &c., but on the contrary thereof, that the said action of debt in the first plea mentioned was brought, and judgment thereon recovered by the plaintiff against the defendant for a large sum, to wit, 2000*l.*, which the defendant, before the commence-

ment of that suit, to wit, on 15th June, 1832, had borrowed of the plaintiff &c.; which said last-mentioned causes of action were different from the causes of action in the declaration mentioned; concluding with a verification.

The replication to the second plea set out the memorial inrolled in the Court of Chancery, stating the consideration to be 1000*l.*, but omitting the nominal consideration to the surety, and traversed that it was not a proper memorial &c.

The defendant demurred specially to the first replication, on the ground that it ought to have concluded to the country, and that it neither confessed and avoided, nor denied the plea. He also demurred generally to the second replication, on the ground that the memorial set out was insufficient.

W. H. Watson, in support of the demurrers, relied upon the above objection to the first replication; which, as the judgment of the Court proceeded on the plea, it is unnecessary to notice. He also contended that, as it appeared by the deed that a consideration of 10*s.* had been paid to a surety, that sum should have been also set out in the memorial required by the 53 *Geo.* 3, c. 141, s. 2; and he endeavoured to distinguish *Ince* v. *Everard* (*a*); but the Court overruled the objection.

Wightman contrà. The first plea being bad, it is unnecessary to consider the replication. The declaration in this case proceeds for unliquidated damages for the breach of covenant on the 15th June, 1834. It is manifest, therefore, that a judgment in debt for 2000*l.*, of Michaelmas term, 1832, can be no answer to the plaintiff's demand. There might be forty years' arrears due on the annuity, and the plea does not pretend that the judgment in debt has satisfied the plaintiff's causes of action.

W. H. Watson contrà. The averment in the declaration, of damages accruing due on June 15, 1834, would be satisfied by proving damages on any other day before action brought; so in like manner the averment of the plea as to the

(*a*) 6 T. R. 545.

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judgment of Michaelmas term, 1832, might be proved by the production of a judgment of another term: for both the allegations are of matters of substance, not of description, and therefore substantial proof is all that is required, *Purcell* v. *Macnamara* (*a*); which overruled *Pope* v. *Foster* (*b*), where the Court held, that the averment, in a declaration for a malicious prosecution, of the day on which the plaintiff was acquitted, must be strictly proved. [*Patteson* J. Do you contend then, that if the plaintiff had replied *nul tiel record*, you might have proved your plea by producing a judgment of another term? for if so, where is the use of the rule of Court (*c*), requiring the number of the roll, and the day on which judgment was signed, to be stated in the margin?] That was to prevent sham pleas, and it is submitted that on an issue of *nul tiel record*, the plea might be proved by the judgment of a later term, just as at Nisi Prius, where, if a record be pleaded as the substantial defence relied upon, a variance in the proof, by production of a record of a term later, is immaterial. "Whatever may have been the rule upon this subject in ancient times, a distinction is now established between allegations of matters of substance, and allegations of matters of description. The former required to be substantially proved; the latter must be literally proved."—*Phill. Ev.* 859, (8th ed.). These words are cited by the learned author, from the judgment of Lord *Tenterden* C. J., in *Stoddart* v. *Palmer* (*d*). The allegation of a judgment recovered for the same causes of action is of the very substance of the plea, and the date being laid under a videlicet, it falls within the rule laid down in *Purcell* v. *Macnamara* (*e*), and in the notes to *Dakin*'s case (*f*). In *Stoddart* v. *Palmer* (*d*), which was an action against the sheriff for a false return to a writ of fieri facias, where the plaintiff alleged in his declaration a judgment recovered in Trinity term, 2 *Geo.* 4, as appears by the record; it was held that proof of a judgment in

(*a*) 9 East, 157.
(*b*) 4 T. R. 590.
(*c*) Reg. Gen. Hil. T. 4 *W.* 4, reg. 8.
(*d*) 3 B. & C. 2; *S. C.* 4 D. & Ry. 624.
(*e*) 9 East, 157.
(*f*) 2 Wms. Saund. 291.

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Easter term 3 *Geo.* 4, was no variance, and the distinction between matters of substance and description was again taken. [*Patteson* J. I cannot see the distinction between a plea of judgment recovered, and an action brought on the judgment; but in the latter case, there is no doubt that the judgment must be stated accurately; *Rastall* v. *Straton* (*a*).] If that be so, still the objection ought to have been taken on special demurrer.

Sed per Curiam (*b*), the plea is clearly bad on general demurrer.

Judgment for the plaintiff.

(*a*) 1 H. Bl. 49.

(*b*) Lord *Denman* C. J. *Patteson*, *Williams* and *Coleridge* Js.

DOE on the several demises of THOMAS OSBORN TAYLOR and JOHN WILLIAM TAYLOR *v.* CRISP.

Tuesday, Nov. 13th.

EJECTMENT to recover copyhold premises, parcel of the manor of Ightham, Kent, of which *Thomas Taylor*, at the time of making his will, and of his death, was seised. The custom of the manor, as regards descent, was gavelkind. At the trial at the Kent Assizes, 1835, before *Park* J., a verdict was found for the plaintiff, subject to the opinion of this Court upon a case, in substance as follows. The lessors of the plaintiff were proved to be the great

1. On a special case the Court will not presume any material fact, which is not expressly stated, unless power be reserved to the Court to draw inferences from the facts stated, and that power be accepted by them.

2. A testator, after giving a life estate to his daughter-in-law, in his real estates, devised the remainder to her son *T. T.* (who was his heir) in fee, upon condition that he should, within three months next after the death of the testator, convey certain leaseholds to his three sisters; but in case he should object or refuse to do so, upon failure thereof, he devised the real estates to his three grand-daughters. The testator died in 1808: his daughter in law then entered upon her life estate, and continued in possession till her death in 1827: the three grand-daughters then entered, and continued in possession up to an ejectment brought by the heirs of *T. T.*:—Held, on a special case stating the will and the above facts, that as it was not expressly stated that *T. T.* had notice of the will within the three months of the testator's death, the Court could not infer the fact, and therefore, as it did not appear that the conditional limitation had taken effect, the lessors of the plaintiff were entitled to maintain ejectment.

3. *Quære*, whether the condition on which the limitation was to take effect would be broken by failure to convey after notice of the will, or whether an express objection or refusal was necessary?

4. The testator, who was seised of a copyhold, died in 1808, leaving *T. T.* his heir-at-law, and devisee of the fee in reversion: *T. T.* died intestate, never having entered or been admitted to the copyhold, nor having dealt with the reversion in any way:—Held, that the heir-at-law of the testator might maintain ejectment without admittance.

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grandsons and customary coheirs at law of the above-mentioned *Thomas Taylor*, who made his will April 9, 1801. By this will the testator described himself as seised in fee of a moiety of a freehold messuage situate in Parsonage Lane, in the parish of Sevenoaks, and also of certain copyholds in the parish of Ightham: "And whereas my late son *Thomas Taylor*, some short time since, departed this life intestate, being seised in fee of the other moiety of the said freehold messuage in Parsonage Lane, and also possessed of three leasehold messuages at Lewisham, and of other personal estate, and leaving his widow *Sarah Taylor*, and his son *Thomas Taylor*, and three daughters, him surviving, and who are all now living, upon whose decease the said *Thomas Taylor*, the grandson, became entitled to the said moiety of the said freehold, as well as to a share of the personal estate: and whereas the said *Thomas Taylor*, deceased, before his death, declared his intention that his said son *Thomas* should have his freehold estate, and that his three daughters should have and be entitled to the said three leasehold messuages, subject nevertheless to the life estate therein of the said *Sarah*, the wife of the said *Thomas Taylor*: and whereas the said *Thomas Taylor* (the party hereto), in order if possible to confirm the intentions of the said *T. T.* deceased, is desirous of devising his said moiety of the said freehold and the entirety of the said copyholds to his said grandson *Thomas Taylor*, son of the said *T. T.* deceased, upon the condition hereinafter mentioned concerning the same:" The testator then devised all his moiety of the freehold in Parsonage Lane, and all his copyholds at Ightham, and all other his freeholds and copyholds, to his daughter-in-law, the said *Sarah Taylor*, for life, and upon her death to his said grandson *Thomas Taylor* in fee, "upon this express condition nevertheless, and not otherwise, that he shall and do, within three months next after my decease, by good and sufficient conveyances, assignments &c., assign over &c., the said leaseholds late of my said son *T. T.* deceased, unto and for the benefit of his said three sisters," . . . . . "*but in case he* my said grandson *Thomas Taylor*

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shall object or refuse to make and execute such conveyances &c. of his respective estates &c. in and to the said leaseholds, for the benefit of his three sisters respectively, *then* and in that case, and *upon failure thereof*, and *immediately* upon such failure, I do hereby revoke and make void the devise of the said freehold and copyhold estates heretofore by me given and devised to my said grandson, and I do hereby give, devise, and bequeath the same, immediately after the decease of his said mother, unto his said three sisters" in fee, as tenants in common, with cross-remainders in the event of any one of them dying under the age of twenty-one years.

The will was duly executed, and the testator died without having revoked it in 1808, leaving his daughter-in-law *Sarah Taylor*, his grandson *Thomas Taylor*, and his three grand-daughters, him surviving.

Sarah Taylor entered into possession of the premises, and continued in possession till her death in August, 1827.

Thomas Taylor the grandson died intestate, February, 1817, leaving two sons, the lessors of the plaintiff, two daughters, and his widow, all of whom are now alive, him surviving.

The grand-daughters of the testator, mentioned in the will, are still living. On their mother's death in August, 1827, they were admitted in the Lord's Court to the premises in question, and the defendant claims by conveyance from them.

Neither *Sarah Taylor* the daughter-in-law, nor *Thomas Taylor* the grandson, were ever admitted, nor have the lessors of the plaintiff been admitted.

The defendant objected, first, that as there was no evidence of the execution by the grandson of any such conveyances or releases for the benefit of his sisters as required by the will, nor evidence of any tender or offer by him to execute such conveyances, the lessors of the plaintiff were not entitled to recover.

Secondly, that the lessors of the plaintiff not having been admitted, could not maintain ejectment.

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The plaintiff contended that it was not incumbent on him to offer evidence on either of the above points, and that there was no evidence of any objection or refusal on the part of *Thomas Taylor* the grandson to execute the conveyances in question.

Thesiger (with whom was *Deedes*) for the lessors of the plaintiff. It might formerly, perhaps, have been made a question, whether the devise in this will should be considered a condition or a conditional limitation, but it would seem now, that it cannot be disputed it is the latter; *Avelyn* v. *Ward* (*a*); *Fearne*'s Con. Rem. 272, 9th ed. Conceding, then, the devise to be operative as a conditional limitation, the question is, whether the event has taken place on which the estate was to go over. The authorities are numerous to shew that provisoes to take the estate from the heir are to be strictly construed; *Co. Litt.* 219 b; *Fraunces's* case (*b*). But a strict construction, in the present case, need not be resorted to; for it is evident that the expressions "if he shall *object* or refuse to make the conveyance," point to some positive act on the part of the heir, in order to defeat his estate. Mere nonfeasance is insufficient. He may have been willing, but may never have been required, to make the conveyance; the fact therefore of its not having been made, does not shew either objection or refusal on his part. This was the view taken by Lord *Ellenborough* C. J. of a similar proviso in *Doe* v. *Lord William Beauclerk* (*c*). But admitting for a moment that the omission to make the conveyance would operate as a breach of the condition, it is a well settled principle of law, that the heir is not to be deprived of his estate, for the breach of a condition in his ancestor's will, unless notice of the will is clearly brought home to him; *Fraunces's* case (*d*), *Malloon* v. *Fitzgerald* (*e*), *Burleton* v. *Humfrey* (*f*), *Doe* v. *Lord William Beauclerk* (*c*). [*Patteson* J. In those cases probably the heir had entered, and may be supposed not to have known any

(*a*) 1 Ves. sen. 420.
(*b*) 3 Rep. 89, b.
(*c*) 11 East, 657.
(*d*) 3 Mod. 29.
(*e*) Ambler, 256.
(*f*) 11 East, 657.

thing about the will. In the present case, the heir never appears to have entered, and no question appears to have been raised at the trial as to want of notice.] In *Burleton* v. *Humfrey* (*a*), it does not seem that the heir, who was the devisee also, as in the present case, had ever entered. As notice therefore was necessary, on what grounds can it be contended that *Thomas Taylor* ever knew of the will, at all events, within three months after the death of the testator, for that is the period during which notice must be brought home to him. It cannot be inferred from his mother being allowed to go into possession of the premises, for he may not have been aware even of that fact, or she might have been entitled under a settlement, or a right to freebench. He might have been absent from England during the whole period.

The last point is, whether the lessors of the plaintiff are entitled to recover without admittance. It is clear that they are the heirs at law of the testator, as well as of *Thomas* the grandson; and that the latter would take as heir, and not as purchaser under the will (*b*). If he had exerted any acts of ownership with regard to his remainder, there is no doubt that this would have been equivalent to actual seisin; that it would have raised a *possessio fratris* (*c*), and would have broken the descent, so as to make him a new stock, from which the lessors of the plaintiff must have claimed (*d*). But not having in any way dealt with the estate, the lessors must claim as heirs to the party last actually seised, viz. the testator, and then *Right* v. *Banks* (*e*) shews that admittance is unnecessary.

Sir *J. Campbell* A. G., contrà. No question was raised at the trial respecting want of notice to the heir, and the only effect of the objection, if successful now, will be to render another ejectment necessary. The main question

(*a*) Ambler, 256.

(*b*) See *Doe* v. *Timins*, 1 B. & Ald. 530; 1 Watk. Descents, 271-4, 3d ed.

(*c*) See Dyer, 291$_1$ pl. 69.

(*d*) See Watkins on Descents, 110, *et seq.*; Co. Lit. 239 b.

(*e*) 3 B. & Ad. 125; see also *Doe* v. *Lawes*, 2 N. & P. 195; *Doe* v. *Rolfe*, 3 N. & P. 648.

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on which the judgment of the Court is desired, is, whether on a proviso couched like that in the will, where the grand-daughters have come into possession under the will, it is not incumbent upon the lessors of the plaintiff to shew that the conditional limitation has not taken effect. Being conceded that it is a conditional limitation, as *Scolastica's* case (*a*), and *Avelyn* v. *Ward* (*b*) clearly shew, and being a limitation valid in law, if the conveyance be not made according to the intention of the testator, the limitation must have its effect. There can be no doubt what the intentions of the testator were, viz. that *Thomas* the grandson should make the conveyance, and it is clear that he has not made it. The Court therefore, as in all such cases, are bound to give effect to the will. The condition does not express that the grandson is to make the conveyance upon request. If a party is directed to do a thing, and on failure thereof is to be exposed to a certain penalty, he may be well said to object or refuse to do it. The testator uses the very words, "upon failure thereof, and immediately upon such failure" he revokes the devise; he has failed to convey. It is true that general words in a will may be cut down by express subsequent words, but the general words in this will are followed by no such language, and the intention of the testator is manifest throughout. Suppose that two only of the grand daughters had called upon their brother to convey to them, it would still perhaps be contended that there was not a sufficient request, but if so, as there are cross-remainders between the three sisters, what inexplicable confusion would ensue? Effect therefore can be given to the manifest intention of the testator, only by holding the conditional limitation to take effect, on the failure to convey the leaseholds within three months of the testator's death. With regard to the want of notice to the heir, the point is not raised for the consideration of the Court. If it were open to discussion, it is quite clear on the facts of the case that there was notice. It is true that on a special verdict no facts can be presumed but

(*a*) 2 Plowd. 403, *nom. Newis et ux.* v. *Lark and Hunt.*

(*b*) 1 Ves. sen. 420.

what are expressly stated; *Doe* v. *Lord William Beauclerk* (*a*); but on a special case the Court are entitled to draw all such inferences as are fairly presumable from the facts stated. In this case the heir, or at least those representing him, must have founded their case on the will, for, as the party through whom they claimed died in 1808, they would have been barred by the Statute of Limitations, unless they had shewn a preceding life estate created by the will. How then can ignorance of the will be pretended? Added to this, there is the fact of the mother taking possession of the copyholds in question, and of the moiety of the freehold estate, to which *Thomas* the grandson was heir, and of which he was actually seised of the other moiety. If *Thomas* the heir had been in possession, as in the cases cited on the other side, it is a very fair rule of law to require strict proof of notice to him of the will, which was to defeat his estate, for the presumption from an heir being in possession is, that he is in by inheritance; and in the cases cited it would appear that the heir really had no knowledge of the will. But what doubt can be seriously entertained in this case that the heir knew of the will, knew that under it his mother was entitled to possession, and knew that, if he did not convey the leaseholds within three months to his sisters, they would take the copyholds at the mother's death?

Thesiger, in reply. With regard to the intention of the testator, it is not disputed that he intended his granddaughters should have either the leaseholds or the copyholds, but to enable the defendant to succeed, it must be shewn also, that the intention of the testator was, that the grandson should take notice of the will at his own peril. Unless that strong presumption is to be gathered from the will, a presumption contrary to the principle of law in favour of heirs, the argument fails. No inference as to notice of the will can be drawn from the production of it by the lessors of the plaintiff, as the only question is, whe-

(*a*) 11 East, 657.

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ther their ancestor knew of it within three months after the death of the testator. If he had notice of it a day after the three months it would have been immaterial.

Lord DENMAN C. J.—If the question turned upon the construction of the condition in this case, it might require much consideration. But it is laid down in several cases, and especially in *Doe* v. *Lord William Beauclerk* (*a*), that where a condition is relied upon for defeating the estate of the heir, notice to him of the condition is absolutely essential. The necessity of notice, indeed, is not seriously contested by the Attorney-General, but he contends, on the facts of the case, that the Court would be justified in presuming it. Now in *Doe* v. *Lord William Beauclerk* (*a*), Lord *Ellenborough* C. J. held, that nothing could be presumed on a special verdict, and the same rule holds with regard to a special case, unless express power be given to the Court to draw conclusions of facts from what is stated in the case, and unless that power be accepted by the Court. Here no facts are stated from which notice can be at all fairly inferred, and if power had been given to the Court, they would in this instance have declined to accept it, for a thousand facts might have occurred, bearing on the question of notice, quite out of the province or the ability of the Court to take into consideration. Relying then on the authority of *Doe* v. *Lord William Beauclerk* (*a*), I think it does not appear that *Thomas Taylor* the grandson had notice of the condition, and therefore judgment must be for the lessors of the plaintiff.

PATTESON J.—I am of the same opinion; and as I found my opinion on the single point of notice being necessary, I find it unnecessary to examine the question as to the construction of the condition, or on whom the burthen fell of proving an offer or refusal to convey. For as notice is necessary, and it does not appear by the case that any whatever has been given, it is immaterial to consider what that notice should consist of; whether there should have been an application to the heir to make the conveyance, and a

(*a*) 11 East, 657.

refusal by him, or a mere knowledge on his part of the existence of the will and condition.

The other point appears conceded, that the lessors of the plaintiff being the heirs of the testator, are entitled to maintain ejectment, for it is quite clear that the descent was not broken.

WILLIAMS J.—The Attorney-General would have us draw the inference from *Doe* v. *Lord William Beauclerk* (*a*), that it is only on a special verdict the Court are precluded from presuming a material fact that is not found; but there is exactly the same objection on a special case, unless power be specially reserved to the Court, which in this case, even if reserved, I do not think would have enabled us to draw the inference desired.

COLERIDGE J.—As the conditional limitation created by the testator did not break the descent, the case of *Right* v. *Banks* (*b*) is applicable, and shews the lessors of the plaintiff to be entitled to maintain ejectment without admittance. As to the fact of notice, I should not be inclined, if I had the power, to draw the inference that the heir did know of the condition within three months. The fact would have been so easy of proof, though not perhaps by direct evidence, that its absence from the case induces the belief that the will really never was brought to his knowledge within that period. I therefore agree with the rest of the Court, that judgment must be for the plaintiff.

Judgment for the plaintiff (*c*).

(*a*) 11 East, 657.

(*b*) 3 B. & Ad. 665.

(*c*) Where it is desired that, from the facts stated in the case, the Court should infer other facts, the practice has been to reserve to the Court special authority for that purpose, as in *Dixon* v. *Yates*, 5 B. & Ad. 313; but where, on the argument of a special case, the existence of a fact, not put in issue by the parties themselves, has become necessary for the decision of the Court, there are instances in which the Court has, without special authority reserved, assumed the fact, and taken a distinction between a special case and a special verdict. See *Doe* v. *Danvers*, 7 East, 307; *Rex* v. *Leake*, 5 B. & Ad. 481, per *Parke* J.; *Martindale* v. *Booth*, 3 B. & Ad. 506, per *Parke* J.; and *Bailey* v. *Culverwell*, 8 B. & C. 455; *S. C.* 2 M. & R. 564. See however the judgment of *Littledale* J. in *Rex* v. *Leake*, 5 B. & Ad. 483.

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Breach, that although defendant, during the life of *T. Southwood*, (whose death took place heretofore, to wit, on the 12th May, 1830,) did well and truly pay to the said *J. H. G.* the said annuity of 50*l.*, and indemnify the said *Thomas Southwood* and his estate from the payment thereof; yet the defendant hath from thence hitherto continually, for divers, to wit, eleven years and upwards, declined and refused to make any further payments to the said *J. H. Gell*, and thereupon the plaintiff, as such executor as aforesaid, hath been called upon to pay and paid for and in respect of the said annuity the sum of 200*l.*, for divers, to wit, four years annual amount &c., of which the defendant had due notice &c. Plea, actionem non, because after the making of the said promise in the (first) count mentioned, and in the life-time of the said *Thomas Southwood*, to wit, on the day and year last aforesaid, the said *Thomas Southwood*, by his certaid deed-poll bearing date on &c., for divers good causes &c., gave and granted to the defendant the offices of steward and clerk of his the said *Thomas Southwood*'s manor aforesaid, during his (the defendant's) life. And the defendant further says, that he thereupon then accepted and agreed to the said deed-poll and to the grant of the said offices therein contained. And the defendant further says, that from the time of the making of the said deed-poll hitherto, he the defendant has exercised the offices therein mentioned, being the same offices as in the declaration mentioned, under and by virtue of the grant in the said deed-poll contained, and under no other appointment, right, title, or authority whatsoever.

Special demurrer, and joinder in demurrer.

The points stated for argument on behalf of plaintiff were as follows:—

That the defendant's plea neither amounts to a traverse nor a confession and avoidance of the declaration.

That the grant of the offices for life, instead of operating as an extinguishment of the former appointment, was a confirmation of it in the same way that every other grant of a

large estate to a party holding a particular estate, operates in confirmation of the latter; and that the contract declared on, and the appointment for life set forth in the plea, are not necessarily incompatible, but may well exist in law.

That if the precarious tenure of the offices at the will of the lord of the manor was a sufficient consideration for the defendant's engagement to keep down the annuity, a violent presumption arises in favour of a continuance of that enjoyment on the continuation of that engagement upon the confirmation and increase of the defendant's interest in the offices.

That it is not to be supposed that the testator would voluntarily place himself in a worse situation on conferring a boon on the defendant by the appointment for life, as he would do if he relinquished the security of the guarantee; and that, therefore, an inevitable conclusion arises in the absence of all express provision to the contrary, that the security of the guarantee was, in the understanding of the parties, to continue as long as the testator's estate was liable to this bond to *Gell*, and the defendant continued in the receipt of the fees of the offices.

That the contract declared on is collateral only to the holding of the offices, and is therefore unaffected by the grant for life.

The points stated on behalf of the defendant were as follows:—

That his original appointment to the offices in question being at the will of the testator, and the offices being to be exercised by the defendant, or a deputy approved of by the testator, the whole contract related to what was to take place during the life-time of the testator, and ceased at his death.

That the defendant would have ceased to hold the offices upon the death of the testator, but for the grant for life; and that, therefore, the present holding of the offices, which is unconnected with that contract, forms no part of the con-

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sideration of the defendant's promise, and does not come within the period to which that promise extends.

That the subject of the defendant's promise, viz. the continuing payments of the annuity, was, by the contract declared upon, made co-extensive with the enjoyment of the offices under and agreeably to the terms of that contract; and that as soon as the offices ceased by the assent of both parties to be held under that contract, and agreeably to the terms of that contract, the liability to pay the annuity also ceased.

That the whole contract respecting the holding of these offices merged in the subsequent freehold appointment.

That the grant for life under seal must be taken to contain all the stipulations and conditions under which the offices thereby granted were thenceforward to be held.

That the rule of law, that a contract under seal always imports a consideration, renders it both unnecessary and superfluous to express a valuable consideration in a deed, unless such deed be intended to take effect under the Statute of Uses; that the Court will therefore take notice that (as the fact is well known to be) a good and valuable consideration may have existed for this grant, though not expressed upon the face of the deed; that, as the law requires no statement of the consideration of a deed, no deed is to be considered as a voluntary deed from the omission of the consideration; and that at the common law no deed is regarded as a merely voluntary conveyance.

Bere, in support of the demurrer. The question is, whether the contract set out in the declaration has received any answer in the plea. It is material to observe the consideration for the defendant's promise, for it is not only in consideration of Mr. *Southwood* permitting the defendant to hold the offices at the will of *Southwood*, but also "in consideration of the premises," i. e. of Mr. *Gell* being induced to give up the offices in consideration of an annuity to be paid by *S.*, so as to give the lord of the manor the power of appointing the defendant. It is however contended by

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the defendant that his promise was to pay the annuity, not so long as he should exercise these offices, but only so long as he should hold the offices at *the will* of Mr. *Southwood*, and that as he has now the offices for life, he is relieved from his promise. This construction of the agreement is novel, and the Court will not adopt such a construction, unless forced to it by some rigid rule. The contract, however, does not fairly admit of this narrow construction. The promise is *general*, to pay so long as he shall execute the office. This cannot be narrowed by the amount of the consideration. The law does not require the consideration to be co-extensive with the promise. There would have been good consideration for the promise, if the defendant were to have held the office at will. It is stated that, as a deed exists, that alone must be looked to for the consideration. It would be strange to find, in a deed of appointment to an office, any consideration at all, the personal qualification of the appointee being the only proper consideration for such appointment; but in fact, the promise of the defendant is completely collateral to the appointment. The argument for the defendant appears to proceed on the ground that the second appointment is to a fresh office; but according to *Shepp.* Touch. 315, such an appointment enures only as a confirmation of the old estate, and therefore does not affect any of the incidents of the first estate.

Manning, contrà. It is said, that the consideration stated in the declaration is to be divided into two parts, and that the premises there mentioned are the inducing Mr. *Gell* to resign, which would be good consideration for the defendant's promise. But this is not so; for, from all that appears on the record, the defendant was an entire stranger to the whole of those transactions.

With regard to the defendant's promise, it is submitted, that it was only to pay the annuity so long as he exercised the offices under his original appointment at the will of Mr. *Southwood*. The death of that gentleman put an end to

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the contract on two grounds: first, it determined the will; secondly, it prevented the defendant from exercising the offices by deputy, to be approved of by Mr. *S.* Suppose that Mr. *S.* had died before he had appointed the defendant for life, and that his heir had immediately appointed the defendant, what ground would there be then for contending the defendant was liable? and if so, what difference does it make that Mr. *S.* and not his heir appointed the defendant for life?

If the promise had been made in respect of an appointment for a year, that might have been good consideration; but an appointment at will is not sufficient consideration, except for so long as the will lasted.

It is said, that the grant in question would operate as a confirmation of the previous estate, but, it is apprehended, the greater estate would extinguish the previous estate at will. As in *Bro. Abr.* Extinguishment 36, 32 *Hen.* 6, 30, where tenant by statute merchant brought an assize, and pending the plea the fee simple descended upon him, it was held that this abated the writ, for the descending of the greater estate extinguished the lesser. So in *Northern's* case(*a*), where *A.*, who was seised of an estate, made a lease for years of parcel of his manor to *B.*, and afterwards made another lease to *C.*, to commence at the expiration of *B.*'s lease; *A.* afterwards enfeoffed *B.* of the manor, and held that this determined the first lease, and that *C.* therefore might enter.

There is another view of the case. Mr. *S.* appointed the defendant by deed, and that deed may be looked at as a sort of contract, but it is entirely silent with regard to any payments to be made by the defendant. Lastly, the contract is clearly illegal, and one that the Court will not enforce. [Lord *Denman* C. J. That point is not raised in the marginal notes, and therefore cannot be taken now.]

Bere, in reply. It is conceded that an appointment for a

(*a*) Het. 55.

year would have been a good consideration, but if so, the same may be said of an appointment for a day, or at will, because the law does not regard the extent of the consideration. It is impossible to give effect to the words of the promise, if it is held to be inoperative at the death of Mr. *S.*, for defendant promises to pay so long as he should exercise the office. With regard to the will of Mr. *S.* having been determined, it may fairly be said that Mr. *S.* exercised his will in defendant's favour, by appointing him for life, and therefore, in the strict sense of the word, the defendant has got all the consideration which moved him to the promise.

Lord DENMAN C. J.—The only question in this case is, whether the change in the tenure of the defendant's office put an end to the agreement made by him with Mr. *Southwood*. I am of opinion that it did not. The agreement was, that in consideration of Mr. *Southwood* permitting the defendant to hold the offices at the will of Mr. *Southwood*, the defendant promised to pay out of the fees of the offices the annuity secured by Mr. *Southwood*'s bond to Mr. *Gell*, during the life of the latter, and to indemnify Mr. *Southwood* from payment of the same, so long as the defendant should execute the said offices. Under this agreement there is no doubt that the defendant entered upon an office at will; but I think the answer, which the objection on this ground has received, is satisfactory, viz.: that by the subsequent appointment for life, the will has been determined in favour of the defendant, and that it is not competent to him to contend that he does not hold at the will of the lord, who has appointed him for life.

PATTESON J.—I am of the same opinion. In the view taken of the case in the argument for the defendant, it seems as if another term were added to the contract, namely, that the defendant promised to pay so long only as he should hold the office under the original appointment. But no traces of such condition are to be found in the declaration.

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I agree, that from the time of the grant for life the defendant held under that, and not under the original appointment; but still he does not the less hold the offices at the will of the lord, and in the most secure manner, for the lord has put it out of his own power to exercise his will against the defendant. I can understand, if there had been any interval, by Mr. *Southwood*'s death or otherwise, between the tenure of the office under the appointment at will and the appointment for life, that the argument raised to-day might have been successful, for there would have been then an interval during which the defendant would not have 'exercised the said offices.' The cases of merger are not applicable, because here the promise is not founded on the quality of estate which the defendant was to have in his offices, but on the fact of his taking the fees and profits belonging to them. The original contract therefore remained, although the defendant afterwards obtained, by a much securer title, that which induced him to make the promise in the first instance. In forming my conclusion that a good consideration is laid for the promise in the declaration, I must add that my decision does not at all proceed on the ground that the introductory averment can be taken as part of the consideration for the defendant's promise, for it does not appear that the defendant had any knowledge of the facts there stated.

WILLIAMS J.—The argument on the grant for life has been pressed as if such grant formed a contract of a higher nature, so as to merge the promise made on the previous occasion, in analogy to an action on assumpsit, where security under seal has been given. But in fact no new contract has been made, and the only effect of the deed was to secure the defendant in the possession of that office; on holding which, he bound himself to indemnify Mr. *Southwood.*

COLERIDGE J.—The simple question is, whether the

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plea sets up any answer to the contract stated in the declaration. The contract seems to me (waiving all question as to its legality) to shew a specific promise by the defendant to pay the annuity, so long as he was permitted to exercise the office at the will of the lord. The answer is, not that he has ceased to exercise the office, but that he does not hold it at the will of the lord, because the lord has appointed him for life. The answer, therefore, is clearly insufficient, and I am glad that we are enabled to come to this conclusion, for it is impossible to avoid seeing that the defendant is much better situated by the very arrangement which he sets up as a defence. I was at first struck with the circumstance, that, in consequence of the death of Mr. *Southwood*, he cannot exercise the office by deputy to be approved of by him; but on attentive consideration of the contract, I think it immaterial, as the promise is in the alternative, to pay so long as the defendant should exercise the offices, *either* by himself or by deputy, to be approved of by Mr. *Southwood*; and the words, "during Mr. *Southwood*'s lifetime," are added, which avoids the difficulty.

Judgment for the plaintiff.

WHEELER *v.* HAYNES.

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CASE. The declaration, after an allegation of the plaintiff's good character, and that he had never been guilty, or

1. A demurrer to a declaration in slander does not admit the particular words spoken, to have been spoken with the intent attributed to them by the innuendo.

2. Therefore where a declaration, after stating that the plaintiff had been in the employment of *B. G.* as a labourer, and had been employed by him in a certain barn of *B. G.* in thrashing corn, alleged that the defendant, maliciously intending to injure the plaintiff, and to cause it to be suspected that he was guilty of felony, said of the plaintiff these false &c., "I saw one *J. G.* coming across *Glass*'s barton with some barley, and my son said, what are you going to do with that? *G.* said, he was going to feed pheasants with it, and said, where he had that, he could have more, and that he had it at Farmer *Glass*'s barn," (meaning the said barn of *B. G.*, and meaning that the barley was the property of *B. G.*, and that the plaintiff had stolen the same from the said *B. G.*), and set out special damage.—Held, on demurrer, that the innuendo was not warranted by the libel or by the inducement.

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until &c., suspected of being guilty of felony, stated that the plaintiff, before and at the time of the committing of the grievance by the defendant hereinafter mentioned, had been and was in the service and employment of one *Benjamin Glass*, as a labourer, and in that capacity had always behaved and conducted himself towards his said employer faithfully and honestly; and the plaintiff and one *B. H.*, at the time of the committing the said grievance by the defendant, were at work for and employed by the said *B. Glass* in a certain barn belonging to the said *B. Glass*, in and about the thrashing certain corn there of the said *B. Glass*; yet, defendant well knowing &c., and contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, and to bring him into public scandal, infamy, and disgrace &c., and to cause it to be suspected and believed that he, the plaintiff, had been guilty of felony, and subject him to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty thereof, and to vex, harrass, impoverish, and wholly ruin him, the plaintiff, heretofore, to wit, on &c., in a certain discourse which he, the defendant, then had, of and concerning the plaintiff, in the presence and hearing of one *B. Hill*, and of divers other good and worthy subjects of this kingdom, then in the presence and hearing of the said *B. Hill* and those subjects, falsely and maliciously spoke and published, of and concerning the plaintiff, these false, scandalous, malicious, and defamatory words following, (that is to say): "I (meaning himself, the defendant,) saw one *John Gay* coming across *Mister Glass's barton, with some barley*, and my (meaning the defendant's) son, *Henry Haynes*, said, 'What art going to do with that?' *Gay* said 'he was going to feed pheasants with it' (meaning the said barley), and said 'where he had that he could have more; and that he had it (meaning the said barley) at Farmer *Glass's* barn,'" (meaning the said barn) belonging to the said *Benjamin Glass*, wherein the plaintiff was so at work and employed as aforesaid, and thereby also meaning

that the said barley, so alleged by the defendant to have been in the possession of the said *John Gay*, was the property of the said *Benjamin Glass*, and that the plaintiff had stolen the same from the said *Benjamin Glass*, and had given the same to the said *John Gay*. Special damage.

General demurrer and joinder in demurrer.

The marginal note of the demurrer stated, as one of the grounds of the demurrer, "that the innuendo charging the plaintiff with having stolen barley from *Benjamin Glass*, is not warranted by the libel, nor supported by it, nor any inducement or previous statement to which it could refer."

Kelly appeared to support the demurrer, but the Court called upon

C. D. Bevan to support the declaration. The defendant by his demurrer has admitted the slander attributed to him; the only question, therefore, for the Court is, whether, supposing the facts set out in the declaration to be true, they can be said to impute a felony to the plaintiff. If the defendant had taken a traverse on the declaration, and the issue had been found for the plaintiff, the Court would have supported the finding, because, to prove it, it would have been necessary to shew that *Gay* could not have had the corn from the barn without the plaintiff having committed felony; *Sweetapple* v. *Jesse* (*a*). The words imputing the theft are ambiguous, but they are explained by the innuendo, which is the proper office of an innuendo; *Com. Dig.* Action on the Case for Defamation, (G 10 in n.) ed. by *Hammond*. In *Mountney* v. *Watton* (*b*), it was contended that the innuendo was too large, but Lord *Tenterden* C. J. held that this was a question for the jury. The cases are collected in the note to *J'Anson* v. *Stuart* (*c*). Special damage is alleged to have been the result of the defendant's slander, and wherever that is so, the action lies; 1 *Stark.* Lib. 2; *Kelly* v. *Par-*

(*a*) 5 B. & Ad. 27.
(*b*) 2 B. & Ad. 673; *S.C.* 2 N. & M. 36.
(*c*) 2 Smith's Leading Cases, 37.

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tington (*a*), per *Patteson* J. [Lord *Denman* C. J. Your argument goes to the extent that special damage, resulting from any words whatever, would entitle a party to an action; for instance, if any one say of another, "I saw *A.B.* walk out of the Court of Queen's Bench," (thereby meaning that he stole some books,) but such a proposition cannot be maintained.] The cases collected in 1 *Starkie*, Lib. 190, et sqq. seem to shew that the action would be maintainable if the words are spoken maliciously, and the special damage follow. But as the defendant has demurred, it is submitted that he has admitted speaking the words in the sense attributed to him: *Digby* v. *Thompson* (*b*).

Lord DENMAN C. J.—Some of the Court appear to have been of that opinion, but I own I never could assent to it. This declaration is clearly not sustainable.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Judgment for the defendant (*c*).

(*a*) 5 B. & Ad. 645; 2 N. & M. 460.

(*b*) 4 B. & Ad. 821; *S. C.* 1 N. & M. 485.

(*c*) See *Gompertz* v. *Levy*, *post*.

Tuesday, Nov. 13th.

BINGLEY *v.* DURHAM.

1. A count in debt on an account stated, averred, that on &c. the defendant was indebted to the plaintiff in £40, on an account *before then* stated between them: —Held, on special demurrer, to be a sufficient averment of the time when the account was stated.

2. Quære, whether time is necessary to be stated at all on an account stated.

DEBT on an account stated. The count alleged, that whereas the defendant, on the 23d May, 1836, was indebted to the plaintiff in the sum of 40*l.* for money found to be due from the defendant to the plaintiff, on an account before then stated between them, by reason thereof an action hath accrued &c.

Special demurrer, assigning for cause that no specific day or time is laid when the supposed account was stated.

Mansel, in support of the demurrer, relied on *Ferguson*

v. *Mitchell* (*a*), and *Spyer* v. *Thelwell* (*b*). [Lord *Denman* C. J. Are you aware of *Debenham* v. *Chambers* (*c*)?] The word "then" in that declaration, clearly referred to the time which must have been previously stated.

G. T. White, contrà. If the Court of Exchequer decided that it is necessary to state the time in a count on an account stated, the decision cannot be supported; but it is believed that *Parke* B. laid down no such law as is attributed to him in *Ferguson* v. *Mitchell* (*a*), as it was quite unnecessary for the decision of the case, and is not warranted by the authorities cited by the counsel in argument (*d*). All that it is necessary to state in *indebitatus assumpsit* is, that the defendant is indebted either for goods sold, work and labour, or on an account stated, so that it may appear to the Court that it is not a debt of record or specialty; Serjt. *Williams*'s Notes to *Peeters* v. *Opie* (*e*), *Tate* v. *Lewen* (*f*), and *Osborne* v. *Rogers* (*g*). In *Emery* v. *Fell* (*h*) there were counts in debt for goods sold, work and labour, money paid, and money had and received, and the time was only alleged as in the present declaration "before that time." On special demurrer, for not alleging time and place, the Court held that it was not necessary, for that it was only form. There is no distinction in principle between a count for goods sold and delivered, and on an account stated. Both proceed upon the contract, and time does not form the essence of it in either case. If *Ferguson* v. *Mitchell* (*a*) can be supported as to the point about time, the present case is distinguishable; for it alleges the account to have been "before then" stated between the parties, a day certain having been previously alleged.

(*a*) 2 C. M. & R. 687.
(*b*) 2 C. M. & R. 692.
(*c*) 3 M. & W. 128.
(*d*) *Higgins* v. *Highfield*, 13 East, 407; and *Denison* v. *Richardson*, 14 East, 291.
(*e*) 2 Wms. Saund. 350, n. (2).
(*f*) 2 Wms. Saund. 373, n. (1).
(*g*) 1 Wms. Saund. 264 b, n. (2).
(*h*) 2 T. R. 28.

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Lord DENMAN C. J.—We think that sufficiently distinguishes the case from *Ferguson* v. *Mitchell*.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Judgment for the plaintiff (*a*).

(*a*) See *Webb* v. *Baker*, 3 N. & P. 87.

Wednesday, Nov. 14th.

The QUEEN *v.* The Inhabitants of YEAVELEY.

1. An order of sessions in 1824, quashing an order for the removal of the pauper's mother, a widow, is material evidence, on a subsequent contest between the same parishes as to the settlement of the pauper, to shew that he was not settled in the appellant parish at the time of the quashing of such order, although he was not named therein, and was then 26 years old, it appearing that in 1817 he had gained no settlement of his own, and that he was then unemancipated.

2. Where it appeared that the pauper was unemancipated in 1817, the onus was cast on the parish contending that he was emancipated in 1824, to prove it, although at such last-mentioned year he was 26 years old, and in an order then made for the removal of the mother, was not included as part of her family.

3. For the purpose of proving that an order of removal had been quashed, the appellants put in evidence the original sessions book, being a paper book, containing the orders of the Court, made up and recorded, after each sessions, by the clerk of the peace, from minutes taken by him in Court; which book he stated to be the record of their proceedings. It was headed at each sessions with the usual caption of the justices, and at the termination of the proceedings was signed "By the Court, (*A. B.*), Clerk of the Peace." No other record was kept of the proceedings at sessions:—Held, that this book was properly received at the sessions as evidence of the order in question, which was contained in it.

ON appeal against an order of justices, for the removal of *Edward Smith* and his family from the township of Yeaveley to the township of Shirley, both in the county of Derby, the sessions quashed the order, subject to the opinion of the Court upon the following case:—

The pauper, *Edward Smith*, was the son of *Edward* and *Millicent Smith*, and was born at Yeaveley, in the year 1798. The respondents, in order to shew a settlement in the appellant parish, proved that the pauper's father, who died at Yeaveley in the year 1811, was born at Shirley, and that after his death, his widow and family received relief weekly, for several years previous to 1817, from the appellant township, whilst residing in the respondent township, and that the pauper, in the year 1817, being then under age and unemancipated, was bound apprentice to

one *William Walker*, under such circumstances that no settlement was gained thereby.

In answer to this case, the appellants offered in evidence an order of removal of the pauper's mother from the township of Yeaveley to the township of Shirley, dated the 6th day of October, 1824, in which order the said *M. Smith* was described as widow of the late *Edward Smith*, (who was the father of the pauper,) and for the purpose of proving that such order was quashed on appeal, they offered in evidence the original sessions book, being a paper book, containing the orders and other proceedings of the Court, made up and recorded after each sessions by the clerk of the peace, from minutes taken by him in Court, which book he considered and stated to be the record itself of the proceedings of the Court. It was headed at each sessions with the usual caption of the justices at sessions. The case then proceeded to state that the book contained under the above heading for the October sessions, 1824, amongst other orders made the same sessions, the following:—

"Upon an appeal brought this sessions by the churchwardens and overseers of the poor of the parish of Shirley, in this county, against an order of removal under the hands and seals of *Richard Arkwright*, the younger, and *William Webster*, Esquires, two of his Majesty's justices of the peace for the said county, (one whereof is of the quorum,) whereby *Millicent Smith*, widow of the late *Edward Smith*, and her grandson *Thomas Smith*, actually became chargeable, and were removed from the township of Yeaveley, in the said county, to the township of Shirley aforesaid, as the place of the lawful settlement of them, the said *Millicent Smith* and *Thomas Smith*; and upon hearing counsel and witnesses examined upon oath on both sides, this Court doth order, that the said order of the said two justices be, and the same is hereby discharged; and doth further order, that the churchwardens and overseers of the poor of the township of Yeaveley aforesaid, do pay to the churchwardens and overseers of the poor of the parish of Shirley aforesaid, the sum of 40*s.* for their costs of this appeal, and also the sum of ———, for the maintenance of the paupers."

The book at the termination of the proceedings of the sessions is signed,

"By the Court,
"*John Charge*,
"Clerk of the Peace."

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Every order, when copied out to deliver, is always signed in the same manner; no other record was kept of the proceedings of the sessions, than the said sessions book, and it had always been received in evidence in the Court for the purpose of proving them. This evidence was objected to, on the part of the respondents, on the ground that it was not material to the issue between the parties; and also, that the order of sessions, if material, could not be proved by such evidence. The sessions received the evidence.

If the Court shall be of opinion, that the evidence was material to the issue between the parties, and afforded an answer to the respondents' case, and that the order of sessions might be proved by such evidence, the order of sessions to be confirmed. If the Court shall be of opinion that the order of sessions could not be proved by such evidence, or that it was not an answer to the respondents' case, the order of sessions to be quashed.

Wildman and *Willmore*, in support of the order of sessions. There are two questions in this case; first, whether evidence that an order, for the removal of the pauper's mother from the respondent to the appellant parish, was quashed on appeal in 1824, was material to the subsequent issue between the same parishes, as to the settlement of the pauper himself; secondly, whether the quashing of such order was properly proved.

First point: The quashing of the order for the removal of pauper's mother was material to the issue.

I. The quashing of the order for the removal of the pauper's mother to the appellant parish in 1824, was material, because the pauper was unemancipated, and had acquired no settlement in his own right, so that an adjudication on his mother's settlement was an adjudication upon his. It is unimportant whether the sessions on that occasion determined that the mother's derivative settlement from her deceased husband was not in the appellant parish, or that she had gained one in her own right in some other parish, as the settlement of the unemancipated pauper would have shifted accordingly, with either state of circumstances. A

confirmed order for the removal of a father is conclusive as to the settlement of a son, although not named in the order, and emancipated at the time of making it, if he has not acquired a settlement in his own right; *Rex* v. *Catterall* (*a*). So an order, unappealed against, for the removal of a pauper as the wife of a person, is conclusive as to the settlement of her husband, *Rex* v. *Hinxworth* (*b*); and a confirmed order removing a woman as a *widow*, though her husband was alive, was held conclusive as to his settlement, *Rex* v. *Rudgeley* (*c*). An order of removal quashed is just as conclusive between the contending parties, as a confirmed order is against all the world. This has long been settled law, and was recognized in the recent case of *Rex* v. *Wick St. Lawrence* (*d*). Although *Parke* J. there observes, that an order of sessions, quashing an order of removal, is conclusive only to this extent, that, at the time when the order was made, the appellant parish was not bound to *receive* the pauper, and that it is not conclusive evidence that the pauper was not *settled* in the appellant parish; yet he adds, that the quashing such an order is primâ facie evidence in favour of the appellant parish. Now that primâ facie evidence was not rebutted in this case. The respondents proved that the appellants, previously to 1817, relieved the mother of the pauper and her family while residing in the respondent parish, at a time when the pauper was under age and unemancipated. The appellants met this case by proving that subsequently, in 1824, the pauper's mother was removed to their parish, under an order describing her as widow, and that this order was quashed on appeal. Primâ facie, at all events, the issue on that occasion was, whether the widow was settled in the appellant parish, so that the adjudication as to her settlement, whether it was that of her husband or one acquired by herself, necessarily involved a decision as to all derivative settlements also. It appears from the case of *Rex* v. *Catterall* (*a*), already cited, that it is immaterial

(*a*) 6 M. & S. 83.
(*b*) Cald. 42; *S. C.* 2 Nol. P. L. 143.
(*c*) 8 T. R. 620.
(*d*) 5 B. & Ad. 526.

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whether or not the pauper was emancipated at this time, provided he had not gained an independent settlement. He was certainly at that time 26 years old, but that of itself would not constitute emancipation, if emancipation be in itself material, *Rex* v. *Sowerby* (*a*); nor would the invalid binding in 1817, *Rex* v. *Edgeworth* (*b*). And the pauper not having been emancipated in 1817, the onus lay on the respondents to shew that the same state of facts did not continue. Thus, *Abbott* J. observes in *Rex* v. *Catterall* (*c*), "as then, the adjudication in 1814 decided that the father's settlement was elsewhere than in *Catterall:* this was conclusive as to the son's settlement there, unless it could have been shewn that the father acquired such settlement after the emancipation of the son." *Rex* v. *Knaptoft* (*d*) was decided on the ground that the settlement of the pauper's brother was altogether a collateral matter.

Second point: The quashing of the former order was proved by the entry in the sessions book.

With regard to the inadmissibility of the paper book as evidence of the order of sessions, because it was not a record, it may be doubted, in the first place, whether the justices at sessions, although a Court of record for the trial of prisoners, are such a Court for the purpose of trying appeals under the poor laws. The 13 & 14 *Car.* 2, c. 12, s. 2, enacts, that persons who think themselves aggrieved may appeal to the justices of the peace of the said county, *at* their next quarter sessions, it does not say, *to* the justices in sessions assembled. In 19 *Vin. Abr.* (*e*) it appears that exception was taken to the caption of an order of sessions, because it did not describe the justices as justices of oyer and terminer; but the Court overruled it, and said, that the justices do not hold their sessions for the examination of matters relating to the poor by force of their commission of oyer and terminer. So also in *Rex* v. *Reading* (*f*) it is said that, where the justices, upon indictments, proceed as a Court of Common Law, they must

(*a*) 2 East, 276.
(*b*) 3 T. R. 353.
(*c*) 6 M. & S. 83.
(*d*) 2 B. & C. 883; *S. C.* 4 D. & R. 469.
(*e*) Tit. Sessions of the Peace, (R.) 355.
(*f*) Cases temp. Hardw. (Lee), 79.

make regular continuances, but that upon orders no such adjournment is necessary, and a case in *Carthew* (*a*) is to the same effect. If the order in question be a judgment of record, error would lie on it. *Com. Dig.* Pleader, (3 B 7). In *Rex* v. *The Nottingham Waterworks Company* (*b*), *Patteson* J. says it would be difficult to proceed, by action of debt or otherwise, upon the judgment there spoken of, although made by statute a record of sessions. Even however if the order of sessions was to be taken as a record, it was properly proved. It had a regular caption, shewing the authority under which it was made, which distinguishes the present case from *Rex* v. *Smith* (*c*) and *Cooke* v. *Maxwell* (*d*). The case finds that no other record than the book offered is kept of the proceedings at sessions, and minutes have been received in evidence where it is not the practice of the Court to draw up the records in form, *Rex* v. *Hains* (*e*). In *Horne Tooke*'s case (*f*) the minutes of the Court were received to prove the acquittal of *Hardy*, on a ground which is applicable to this case, namely, that the matter proved by them occurred before the same Court sitting under the same commission. Even in this Court, where, by the practice of an Ecclesiastical Court in granting probate, the act of the Court was indorsed on the will itself, and no other record of their act was kept, the original will so indorsed was held to be primary evidence; *Doe* v. *Gunning* (*g*). But it is not necessary to concede that the sessions book itself was not the proper record of the order. It cannot be essential to a record that it should be drawn up on parchment. Though a record in *Co. Litt.* (*h*) is described as "a memorial of a proceeding or act of a Court of record, entered on a roll of parchment for the preservation of it;" yet this seems intended by way of general description, and with reference to the superior Courts only. *Rex* v.

(*a*) *Rex* v. *Colliton*, p. 221, pl. 3.
(*b*) 1 Will. Woll. & Dav. 166; *S.C.* 1 N. & P. 480.
(*c*) 8 B. & C. 341.
(*d*) 2 Stark. N. P. 183.
(*e*) Comb. 337.
(*f*) 25 St. Tr. 447.
(*g*) 1 Will. Woll. & Dav. 460; *S. C.* 2 N. & P. 260.
(*h*) 260 a.

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Ward (*a*), in which the sessions book was considered, on an indictment for perjury, to be insufficient to prove that an appeal against an order of removal came on to be heard, is not an authority against the appellants, for there the deputy clerk of the peace stated that he would, if applied to, have drawn up a record of the appeal on parchment.

First point.

N. R. Clarke, contrà. The appellants have relied on *Rex* v. *Rudgeley* (*b*), to prove that the quashing of the order for the removal of the pauper's mother to their parish in 1824, shews the pauper's settlement not to have been there at that time, and that it consequently was material to the inquiry respecting his settlement now. But that was a case where the order was unappealed against, and was for the removal of a woman as a widow, though her husband was alive. The adjudication on the settlement of a married woman obviously involves an inquiry into the settlement of the husband, and it is to be presumed that a married woman is removed to the place of her husband's settlement. But it does not follow that the quashing of an order for the removal of a person really a widow raised any issue whatever as to the settlement of the pauper, her son, who stood in no such relation to her, as that her settlement would necessarily devolve upon him. She had been a widow several years, and probably had acquired a settlement in her own right, since her husband's death, so that his settlement need not have come in question. At the time of the order the pauper was twenty-six years old, and this, together with the circumstance that he was not then removed with her, affords a strong presumption that he was then emancipated, and no evidence was given to rebut it. If he was not then part of her family, it is clear, from all the authorities, that he could not derive a settlement from her. But *Rex* v. *Knaptoft* (*c*) is conclusive against the effect ascribed by the appellants to the quashed order. In that case the appellant parish tendered in evidence a prior order of sessions, quashing an order for the removal of the

(*a*) 6 C. & P. 366.
(*b*) 8 T. R. 620.
(*c*) 2 B. & C. 883; *S. C.* 4 D. & R. 469.

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pauper's brother to their parish, and also parol evidence to shew that the judgment of sessions proceeded on the ground that the father of the pauper had not at that time any settlement there. It was held, however, that the order of sessions was not evidence that the father of the pauper was not then settled in the appellant parish, because the father's settlement was an inquiry quite collateral to the issue on the first appeal. *Bayley* J. says, in giving the judgment of the Court, "Then the question to be considered in this case is, whether the point actually decided with respect to the settlement of the brother in 1815 is necessarily the same as that which was to be decided by the Court in the present case with respect to the sister; or whether the point now sought to be established as to the father's settlement was one which then came collaterally in question." It cannot be contended that the settlement of the pauper in this case necessarily came into question in 1824. [Lord *Denman* C. J. In *Rex* v. *Wheelock* (*a*) *Bayley* J. does not seem to go so far, for he merely lays it down that, where an order is quashed generally, the respondents are not, at all events, concluded, but that they may, on the trial of another appeal, explain by evidence the ground of the former judgment.]

But, even if the former order was material, it was not proved. The judgment must always be proved by a proper record, and there is no distinction in this respect between a judgment of Sessions and of other Courts. It is clear, that the conviction or acquittal of a prisoner could not be proved by any thing but a record, and *Horne Tooke*'s case (*b*) does not apply; for here the justices in 1824 adjudicated under a different reign and different commission. *Rex* v. *Smith* (*c*) is a very strong authority, for there the minute book was not admitted to prove the mere caption of an indictment, whereas here it was admitted to prove a judgment. In *Porter* v. *Cooper* (*d*) the original indictment indorsed "true bill" was disallowed as evidence to prove that an indictment had been

Second point.

(*a*) 5 B. & C. 511.
(*b*) 25 St. Tr. 447.
(*c*) 8 B. & C. 341.
(*d*) 6 C. & P. 354.

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preferred at sessions; and *Rex* v. *Ward* (*a*) cannot be substantially distinguished from the present case.

Second point.

Lord DENMAN C. J. (after stating the facts of the case) —I am of opinion that the sessions book was properly received as evidence that an order for the removal of the pauper's mother to the appellant parish was quashed in 1824. The book contained a regular caption, shewing the authority of the sessions who made the order, and a statement of the order itself; and it appears also, though it may be doubtful whether it be material, that no other record of such orders was ever made. Unless we are to hold that parchment was necessary to prove the order, the book in question was legitimate evidence. A decision by the justices is all that takes place, and it is not followed up or modified by any ulterior proceedings. In *Rex* v. *Ward* (*a*) it does not appear what the state of the minute book was, but I should rather infer that it was a book kept by the deputy clerk of the peace for his own convenience, and that it did not contain any caption, so that our judgment upon this point does not interfere with the authority of that case.

First point.

What then was the effect of this quashed order in 1824? The language of *Bayley* J., in *Rex* v. *Knaptoft* (*b*), was unnecessarily large. The adjudication in 1824, although it might have gone on other grounds, was at least primâ facie evidence, which was unanswered, that the settlement of the pauper's mother at that time was elsewhere than in the appellant parish. The pauper himself was not shewn to have been then emancipated, though twenty-six years old; it appeared that an attempt had been made in 1817 to bind him an apprentice, but that it had failed. There was evidence then that he was unemancipated in 1817, and it was not shewn that the state of facts was altered in 1824. Taking it therefore that he was unemancipated, it would appear that the settlement of his mother, which had been previously adjudicated upon, would extend itself to him; so that a

(*a*) 6 C. & P. 366. (*b*) 2 B. & C. 883; *S. C.* 4 D. & R. 469.

good primâ facie case was made out by the appellants to meet the other primâ facie case of relief given by them to the widow and family while resident in the respondent parish.

PATTESON J.—I think, in the absence of any direct authority, we must hold that the sessions book was receivable in evidence. In *Rex* v. *Ward*(*a*), it appeared that something more than the book would have been producible, if it had been asked for; here it is found that the practice is to do no more than make the entries in the book, and that it is treated as a record of the Court, so that it comes to the question whether or not parchment be necessary. I am of opinion that it is not. Now with regard to the materiality of the evidence. It is found that in 1817, when the pauper was nineteen years of age, he was put out as an apprentice under such circumstances that he gained no settlement thereby. We hear nothing more of him; it does not appear whether he ever returned to his mother at all; there are no new facts to shew whether he was emancipated or not. The cases shew that it is not necessary that he should have returned before he was twenty-one. But, as it appeared that he was not emancipated in 1817, the onus of shewing that he was emancipated in 1824 lay on the respondents, who offered no evidence of it. We must presume then that he was unemancipated. It matters not whether the order of sessions proceeded on the ground that the widow had gained a settlement in her own right, which was elsewhere than in the appellant parish, or that she had gained no settlement at all, and that the settlement of her deceased husband was elsewhere. The respondents are in a dilemma, a derivative settlement elsewhere than in the appellant parish would on either supposition be communicated to the pauper.

Second point.

First point.

WILLIAMS J.—I am entirely of the same opinion on both points. There is no instance where an objection to

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(*a*) 6 C. & P. 366.

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the admissibility of such an instrument as the sessions book, to prove their own order before the justices themselves, has been considered a valid objection. It is said a minute might be evidence of a conviction in the same manner. But how could such a minute prove any such thing? The judgment might have been arrested. So to prove that a person had committed perjury, it is essential that the jurisdiction of the Court in which perjury was committed should appear; and that could only be manifested to another Court at least by a formal record, as was held in *Rex* v. *Ward* (*a*). The book in this case was, in my opinion, a record for the purpose of proving to the sessions the existence of one of their own orders. In considering the effect of such order we are brought back to very early principles indeed. None of the books omit to tell us that an order quashed is conclusive between the same parishes, as to the point decided. What was the point decided? The settlement of the mother. This would communicate itself to her son, if unemancipated. According to the ordinary principles of evidence, it lay on the respondents to shew that he was emancipated, for the last account of him is, that he was not so, and we must presume that this state of facts continued, until the contrary be shewn.

First point.

Second point.

COLERIDGE J.—This case is very simple. The evidence was cogent, if admissible. As to the mode of proof, we learn that the practice of the Court was to have no other record. The book contained a regular caption, shewing the authority under which the Court sat. Mr. *Clarke* has admitted that he has never seen a formal record of a sessions order, nor have I. With respect to the effect of the evidence, no one can doubt at this time of day that an order quashed is conclusive between the same parishes as to a settlement at the time of the adjudication upon it, and that unemancipated children follow the settlement of their father, and on his death that of their mother. On whom

First point.

(*a*) 6 C. & P. 366.

then was the onus to prove this pauper's emancipation? Obviously it was upon the respondents, who contended that the state of things was different from what it was found to be when the cause was tried before.

Order of Sessions confirmed.

Ex parte HENRY.

Saturday, November 3d.

Although a person desirous of being admitted an attorney has already passed one examination, and failed to obtain his certificate from the Examiners appointed under R. G. Hil. 6 *Will.* 4, he must give a fresh term's notice to the Examiners, if he intends to apply again to be examined.

KELLY on this day moved for a rule, directing the Examiners (appointed in pursuance of the Reg. Gen. Hil. 6 *Will.* 4, for the examination of attornies,) to examine into the fitness of Mr. *Henry* to be admitted an attorney of this Court, at their ensuing examination.

The affidavit, on which the motion was founded, stated that the applicant had duly given the term's notice required by the rule No. 4 (*a*), previous to Trinity term last, and that he had undergone the examination, but had failed to obtain his certificate, in consequence of his want of knowledge on a point of equity practice. It also alleged that he now believed himself to be fully qualified for undergoing another examination with success, and that notice had been given to the Examiners of this application, who, it was understood, did not offer any opposition to it.

Kelly contended that, under these circumstances, the term's notice previous to an examination, as required by the rule No. 4, was not necessary. The object of that notice was to enable the Examiners to inquire into the respectability of

(*a*) The rule orders that the examinations of attornies shall be held within the last ten days of every term, "and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination; which notice shall also state his place or places of residence or service for the last preceding twelve months."

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the applicant; and therefore the fact of a person being rejected for ignorance of a slight point of practice can cause no necessity for a fresh notice being given.

The COURT (*a*).—We think it quite clear on the terms of the rule, and also highly expedient, that a fresh term's notice should be given, as if nothing had previously taken place.

Rule refused.

(*a*) Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

Thursday, Nov. 15th.

The QUEEN *v.* The Recorder of STAMFORD.

On an appeal against a borough rate, at the Epiphany sessions, the town clerk, who appeared for the respondents (the town council), objected that the appeal ought to have been to an earlier sessions; but the Court of Quarter Sessions, on inspecting the rate, decided that the appeal was properly lodged. The appeal was then adjourned to the following Easter sessions, and from thence, at the request of the respondents, to the Midsummer and Michaelmas sessions successively. Previous to the Michaelmas sessions, the town council abandoned the rate as a nullity. At the Michaelmas sessions the appellants proved their notice of appeal and their notice to produce the rate, but no one appeared for the respondents, although the town clerk was present in Court. The appellants then moved for their appeal to be confirmed, with costs. The Court of Quarter Sessions decided that as there was no proof given of a rate, or, at all events, of a legal rate, it had no jurisdiction:—Held, that the rate was sufficiently before the Court to give it jurisdiction.

SIR *W. W. FOLLETT* had obtained a rule nisi for a mandamus to the Recorder of Stamford, calling on him to shew cause why continuances should not be entered to the then next Quarter Sessions for the borough of Stamford, upon the appeals of *J. C. Grant* and others against a rate in the nature of a county rate, made on the inhabitants of the said borough.

It appeared by the affidavit on which the rule was obtained, that a rate had been made for the borough of Stamford on the 6th December, 1836, against which certain of the inhabitants appealed. The appeal came on to be heard at the Epiphany sessions, 1837, when the town clerk, who appeared for the respondents (the town council), contended that the rate was not made on the 6th December,

but on a day previous to the last foregoing sessions, to which sessions the appeal ought to have been made. The respondents produced in Court the original rate, which was inspected by the Recorder, who decided that the rate must be considered as having been made on the said 6th December; and it being then late in the day the hearing of the merits of the appeal was postponed till the next Easter sessions.

At the Easter sessions the appellants attended with their witnesses, at which time the town clerk, on behalf of the respondents, stated that they entertained considerable doubts as to the validity of the rate, and that it would tend greatly to the convenience of the respondents if the appellants would assent to the appeal standing over till the Midsummer sessions; which proposition was agreed to, and a motion to that effect was made by the appellants.

At the Midsummer sessions a similar application was made by the town clerk, and assented to by the appellants; and the appeal stood over to the Michaelmas sessions, on the motion of the appellants.

At the Michaelmas sessions the appellants again attended with their witnesses, at which time the town clerk was present in Court, but declared that he did not attend on behalf of the respondents. The appellants then proved the due service of notice of appeal, and also of the notice to produce the rate, upon the town clerk; but he refused to produce the same. The Recorder then inquired if any one appeared for the respondents, and was informed by the town clerk that no one appeared. He then asked if any one produced the rate, and was also informed by the town clerk that no one produced it. The appellants then applied to the Court to confirm the appeal, with costs, and stated that they were prepared with evidence to shew that the rate had been abandoned by the town council. The Recorder stated that he could not grant the appellants the relief as to costs which they prayed for, it did not appear that the rate appealed against ever existed; and that even if there

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had been a rate which was abandoned by the respondents as illegal, an illegal rate was no rate, and consequently there was nothing before the Court against which an appeal could be heard.

The affidavit concluded by referring to *The King* v. *Justices of Cambridge* (*a*), to shew that the Recorder had jurisdiction.

The affidavit of the town clerk, in answer, stated that previous to the Easter sessions, 1837, he communicated to the attornies for the appellants, that the town council having had the opinion of counsel that the rate was a nullity, considered it necessary to make a new rate, which was accordingly done; and that at the Michaelmas sessions the Court decided that there was no rate to appeal against, and that the burden was on the appellants to shew that it was a rate.

Sir *J. Campbell* A. G. now shewed cause. The Recorder was quite right in his decision. As the rate was not produced under the notice, it was incumbent upon the respondents to prove it by secondary evidence, in order to give the Court jurisdiction. The facts in this case are wholly distinguishable from the case of *The King* v. *The Justices of Cambridge* (*a*). There a valid order of justices was produced at the sessions; and this Court was of opinion that the objections taken to it were not tenable, even if the affidavits which contained them were admissible. In the present case there was no evidence before the Court of any rate at all, and no one appeared for the respondents. The rate itself had been the subject of an action, and had been held to be bad, as a retrospective rate; *Woods* v. *Reed* (*b*): it was therefore no longer in existence. The burden was clearly on the appellants to prove not only the rate, but also that they had been called on to pay under it.

(*a*) 4 N. & M. 238.

(*b*) 2 Mee. & Wels. 777. See 7 *Will.* 4 & 1 *Vict.* c. 81.

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Sir *W. W. Follett*, contrà. It is contended that because there was no legal rate the Recorder had no jurisdiction; but the appellants' case depended, of course, on the illegality of the rate. The town clerk has not denied the facts that the different adjournments were made at his own request. [Lord *Denman* C. J. Does it appear to have been brought to the Recorder's notice that the appeal had been partly heard before him at the Epiphany sessions?] That was not disputed.

Lord DENMAN C. J.—We think that the rate was sufficiently before the Court to put it in possession of the appeal, and that the decision was erroneous.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

The QUEEN *v.* FROST.

Thursday, Nov. 15th.

A controversy existing in a corporation between the freemen, under the old charter, and the town council, under 5 & 6 *Will.* 4, c. 76, as to the exclusive right of the former to some corporation property

MAULE, in Michaelmas term, 1837, had obtained a rule calling upon the defendant to shew cause why a mandamus should not issue to him to pay over to the treasurer of the borough of Newport all sums of money received by him for and on account of the rents of the corporation property of the said borough.

The rule was obtained on the affidavit of one *James Goold*, who stated himself to be a rated inhabitant, and a burgess and freeman of the borough; which affidavit contained the follow-

to their own private use, a public meeting of the freemen was held, and a resolution was carried at the instance of *A.*, a freeman, that the rents should be paid into the hands of the defendant, to wait until the claim of the freemen should be decided: the rents having been so paid, and a rule nisi having been obtained by *A.*, as a freeman and burgess, and an inhabitant of the borough, liable to contribute to the borough rate, for a mandamus to the defendant to pay the money over into the hands of the treasurer of the borough, the Court discharged the rule: and *semble*, the parties to apply for a mandamus in such a case are the town council, treasurer, or other authorized party, and not any individual having a remote interest in the corporation funds.

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ing statements: For many years before, and at the time of the passing the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), the mayor, aldermen and burgesses of Newport had been seised of certain lands and hereditaments, amongst which were some premises called the Corporation Wharf, which, by a lease dated 1st January, 1827, had been demised by the mayor and aldermen of the borough of Newport to *George Getling*, for the term of twenty-one years, at the rent of 102*l.* 10*s.* per annum. Up to Michaelmas, 1832, the rent was received by the town-clerk, and was applied by him, under the orders of the mayor and aldermen, for the payment of salaries and for other public purposes. The defendant, on the 26th December, 1835, was elected and still is councillor of the borough, and on the 9th November, 1836, was elected mayor, and before he was elected councillor, and since his election, he had received various sums of money on account of the rent aforesaid. On the 1st January, 1832, the council appointed *Philip Jones* their treasurer, who has continued to be treasurer up to the present time, but the said rents have not, "as this deponent is informed," been paid to the said *P. Jones*, or otherwise accounted for by the defendant. The affidavit then stated a demand made by prosecutor, as a freeman of the borough, and also a burgess and inhabitant of the same, liable to contribute to the borough rate, on the defendant, to pay to the treasurer of the borough all monies belonging to the mayor, aldermen and burgesses of the borough, and particularly the rents in question.

The affidavit of the defendant in answer stated, that the premises in question were, until within the last forty years, of little annual value; that there was a meadow of about forty acres, the net proceeds of which had, from a remote period down to the present time, been divided of right amongst the resident freemen of the borough, (which was an ancient borough by prescription,) to their own use, and that the land which now constitutes the Corporation Wharf, was reputed to have been, and, as the defendant believed, of

right, appropriated to the said freemen, for their private use.

The affidavit then set out facts, by which it appeared that about forty years ago the Duke of *Beaufort* built the Corporation Wharf, and that upon a claim made by the freemen he gave it up to them, and that they thereupon appointed a receiver, without the concurrence of the mayor and aldermen. From the year 1807 to the year 1833, the rents were received by the town-clerk, and were applied by him under the orders of the mayor and aldermen, but the freemen did not acquiesce in his receiving the rents or in the application made, and frequently demanded that the wharf should be given up to them. In consequence of this claim, a public meeting of the mayor, aldermen and burgesses was held on 24th January, 1833, to take it into consideration, and a committee of freemen was appointed, of which the defendant was a member, and to which he acted as secretary. The committee reported that in their opinion the wharf was the property of the freemen, and that the rents and profits ought to be applied for their private use. The wharf was thereupon given up to the freemen, and the rents were received by the committee, and paid to the defendant as secretary thereof. After the passing of the 5 & 6 *Will.* 4, c. 76, much difference of opinion existed in the borough as to the Corporation Wharf, many of the freemen claiming the whole thereof for their private use, and some of the council claiming the whole for public purposes. A public meeting of the freemen was held in consequence, on the 14th December, 1836, when the defendant was mayor, at which a resolution was moved, and was seconded by the said *James Goold*, to the effect that the defendant be requested to receive the rents of the different tenants, and pay the same into the bank in his own name, to remain there until the claim of the burgesses therein be decided; which resolution was agreed to.

The defendant, in pursuance of this resolution, received the rents, and paid them into the bank in his own name, where the money now remains.

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The affidavit then stated that the defendant had repeatedly offered to pay the money over to the freemen or to the council, on receiving an indemnity, but that he had received no indemnity, and that no demand had been made upon him by the council or by the treasurer for the money.

Sir *W. W. Follett* now shewed cause. This is not a proper subject for a mandamus. If Mr. *Frost* has received rents of property belonging to the corporation, they may bring an action. What right has the prosecutor to interfere? The town council are able to protect themselves. The corporation may be of opinion that these rents do not belong to them, but if they are guilty of a breach of trust, there is a remedy elsewhere. No precedent can be found for such an application as the present.

Maule, contrà. The controversy which has been raised within the borough, as to the Corporation Wharf, has nothing to do with the present motion. It cannot be denied that the premises belong to the corporation, and therefore the rents and profits ought to be paid to the treasurer, under section 92 of 5 & 6 *Will.* 4, c. 76. The question attempted to be raised by the defendant cannot be decided on affidavits. Under that section, and under section 2, all the rights which the freemen may have would be regarded, but the proceeds of corporation property must, in the first instance, go into the hands of the treasurer. Whatever application is to be made of the funds, it is clear that the defendant has no right to retain them. [Lord *Denman* C. J. It does not appear that the treasurer or the council have made any application to the defendant for the funds; it appears to me that the treasurer is the party who ought to make the application to this Court.] *Goold* is clearly entitled to make the application; he is a member of the corporation and also a freeman, he has therefore a strong interest in the affairs of the corporation.

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Lord DENMAN C. J.—It appears to me that this application cannot be supported, as *Goold* was the very party at whose instance the defendant lodged the money in the bank. It does not at all appear that, if a demand had been made on the defendant by the treasurer of the borough, he would not have paid the money into his hands immediately. If we were to listen to an application of this kind, we might entitle any party having the remotest interest in corporation funds to a similar remedy, although the Court was not called upon to interfere by the treasurer or other authorized party, from whom the proceedings ought to emanate.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

The QUEEN *v.* The Committee of Trustees of SOUTH HOLLAND DRAINAGE.

Thursday, November 15.

1. Where, under a private act, a compensation jury can only be impanelled after forty days notice in writing to the party interested, it is not competent to him, after expressly waiving his right to notice, to apply to quash the inquisition, on the ground of its not setting out such notice, or the waiver of it.

2. *Quære*, whether, under a private act authorizing the trustees of a drainage to purchase any "lands, tenements, or hereditaments," for the purposes of the act, making compensation for the same, such words extend to copyholds; but held, that at all events a party could not take the objection who had treated with the company and had concealed the fact of his land being copyhold.

3. A private act directed a compensation jury to assess the sum to be paid for the purchase of lands, or the recompence to be made for damages or losses sustained by cutting lands, &c.; a jury, having found on inquisition that 56*l.* was the proper sum to be paid for the land to be purchased, and for the recompence to the owner for the damage he might sustain, also directed the trustees to erect a hedge on the owner's land at their own expense:—Held, that as it did not appear that less compensation-money was awarded on that account the inquisition was not void.

W. H. WATSON, in Michaelmas term, 1837, had obtained a rule calling upon the defendants to show cause why a writ of certiorari should not issue to remove into this Court a verdict, and inquisition and judgment thereon, made on the 16th August, 1837, before the defendants, touching the compensation to be made to *Philip Copeman*, for certain land taken by the committee-men under the 57 *Geo.* 3,

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c. lxix (*a*), (local and personal, public.) In the affidavit of Mr. *Copeman*, on which the rule was obtained, it was

(*a*) Intituled, An Act for amending and rendering more effectual an Act of his present Majesty for draining Lands in South Holland; and for continuing and amending another Act of his present Majesty for maintaining and repairing a certain Bank, and the Road thereon, from Spalding High Bridge to Brother House, all in the county of Lincoln.

Sect. 36 enacted, that the said committee-men under this act shall have full power and authority to agree, on behalf of the trustees under this act, with the proprietors of and persons interested in any lands, tenements or hereditaments, which the said committee-men shall adjudge necessary to be cut, digged, taken, or otherwise made use of for the purposes of this act, for the purchase of such lands, tenements, and hereditaments, or for the recompence to be made to such proprietor and persons interested, for the damage they may sustain, and also to settle and ascertain in what proportions the sum or sums so agreed for shall be paid to the several persons interested in the premises; and that it shall be lawful for all bodies politic, corporations, tenants for life or in tail, husband, guardians, trustees, and feoffees in trust, committees, executors, administrators, and all other trustees or persons whomsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of their cestui que trusts, &c., and to and for all femes covert, who are or shall be seised or interested in their own rights, and to and for all other persons whomsoever, who are or shall be seised, possessed of, or interested in any such lands, &c., to contract for, sell, and convey, unto the trustees under this act for the time being, and their successors, any lands, &c., for the purposes aforesaid, or to agree with the said committee-men for the time being for any recompence or compensation to be made for the damages which may be done to any such lands, &c., by the execution of any of the powers of this act; and all such contracts, sales, conveyances, and agreements shall be valid and effectual in law to all intents and purposes whatsoever, any law, statute, usage, or custom, to the contrary notwithstanding, and all bodies politic, corporate, or collegiate, and all persons whosoever, are hereby indemnified for what they or any of them shall lawfully do in pursuance of this act. But if it shall happen that any such body politic, corporate or collegiate, trustee or trustees, or other person or persons interested or concerned as aforesaid, shall for the space of *forty days after notice in writing* given to the principal officer of such body politic, corporate, or collegiate, or to such trustee or person respectively, or left at his, her, or their respective place or places of abode, or at the house of the tenant or tenants, occupier or occupiers of such lands, tenements, or hereditaments, neglect or refuse

stated that *Elizabeth* his wife was seised in her own right of a copyhold close of the manor of Sutton Holland, in the parish of Sutton St. Mary, of which the deponent was in

to treat, or shall not agree with the said committee-men for the time being, or by reason of absence shall be prevented from treating, or cannot be found or discovered, then and in every such case the said committee-men for the time being are hereby empowered from time to time to issue out their warrant or warrants under their hands and seals to the sheriff of the county of Lincoln; or if such sheriff shall be immediately interested in such matter, then to one of the coroners of the said county, commanding such sheriff or coroner to impanel, summon, and return a jury; and the said coroner is hereby required accordingly to impanel, summon and return twenty-four men resident within South Holland aforesaid, and qualified according to the laws of this realm, to be returned for trials of issues joined in his majesty's Courts at Westminster to appear before the said committee-men at such time and place as in such warrant or warrants shall be appointed, in order that out of them a jury of twelve may be sworn, to inquire touching the matters in question; and in case a sufficient number of jurymen shall not appear at such time and place, the said sheriff or coroner shall return other honest and indifferent men, that can speedily be procured to attend that service, being qualified as aforesaid, to make up the said jury to the number of twelve; and all parties concerned may have their lawful challenges against any of the said jurymen; and the said committee-men are hereby empowered by warrant under their hands and seals, from time to time as occasion shall require, to summon and call before them all such persons as shall be thought necessary to be examined as witnesses touching the matters in question; and the said committee-men for the time being may order or authorize the jury, or any six or more of them, to view the place or places or matters in controversy, which jury upon their oaths (which oaths, as also the oaths to such person or persons as shall be called upon to give evidence, the said committee-men for the time being are hereby empowered to administer) shall inquire of, assess, and ascertain the sum or sums of money to be paid for the purchase of such lands, &c., or the recompence to be made for damages or losses that may or shall be sustained as aforesaid, and to settle and ascertain in what proportions the sum or sums so assessed shall be paid to the several persons interested in the premises; and the said committee-men under this act shall give judgment for such purchase-monies or recompence so as aforesaid to be assessed by such juries, which said verdict, and the judgment thereupon pronounced by the said committee-men, shall be binding to all intents and purposes against all bodies politic, corporate and collegiate, and all persons whomsoever.

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possession. The committee-men having determined to purchase adversely from the deponent part of the close, for the purposes of the act, impanelled a compensation jury on the 16th August, 1837; and the inquisition, after setting out the caption, stated, that the "jury assess and ascertain the sum of 56*l.* to be the true value of and a proper sum to be paid by the said committee-men for the purchase of one rood and thirty-six perches of land (little more or less), situate in or near to the parish of St. Mary, otherwise Long Sutton aforesaid, and adjoining the main drain mentioned or referred to in the said recited act, and being the property or reputed property of *Philip Copeman*, of Sutton Mary aforesaid, gentleman, and which land has been adjudged by the said committee-men necessary to be taken and made use of for the purposes of the said recited act, and for the recompence to the said *Philip Copeman* for the damage he may sustain: which said sum of 56*l.*, so assessed and ascertained as aforesaid, shall be wholly paid to the said *Philip Copeman*; and the said committee-men shall moreover, at the expense of the South Holland Drainage Trust, plant white thorn quicksets on the bank reserved or retained by the said *Philip Copeman*, four feet distant from the edge of the land purchased and taken by the said committee-men as aforesaid, and place and fix within side the said quicksets a post and three rail fences for the protection thereof, and use due means for the next ensuing seven years to prevent the same quickset from being injured by cattle or otherwise on the side thereof next to the said purchased land and main drain aforesaid. The committee-men thereupon gave judgment for 56*l.* to be paid as in the above inquisition is mentioned. No notice in writing, as prescribed by the act, was given previously to the impanelling the jury. The affidavit then submitted that the inquisition was void, as it set out no notice in writing, as it awarded no compensation to the lord of the manor in respect of his interest in the copyhold close, and also as the jury, instead of awarding a recompence in money for the whole damage, had assumed to authorize the

committee-men to commit trespasses upon other land of the deponent, and do certain works thereon as part of such recompence.

The affidavits in answer stated, that the committee-men having determined to take part of Mr. *Copeman*'s close for the purposes of the act, and having applied to him upon the subject by letter of 14 January, 1837, received the following answer:—

"SIR, Long Sutton, 4th July, 1837.

Inclosed I transmit, agreeable to your request, the particulars of a valuation of a plantation belonging to me, which the committee-men of the South Holland Drainage are desirous to purchase. The average of profits is taken at twenty-years purchase, which I hope will prove satisfactory, not wishing to give unnecessary trouble. I remain, &c.

P. Copeman."

Annexed to the letter was a statement of the price required, viz. for the land 154*l.*, and for the oaks and ash standing thereon 6*l.*, total 160*l.* The committee-men, considering the sum exorbitant, appointed two valuers to value the close, and Mr. *Copeman* attended at a meeting where a report of the valuation was given in. Mr. *Copeman* then refused to accept the sum (56*l.*) at which the close was valued, and a conversation ensued as to the necessity for forty days notice before a compensation jury could be impanelled, and "the said *Copeman* thereupon expressly stated, that as the question must go to a jury, he did not care how soon, and the sooner the better," and therefore "with the full and entire and expressed satisfaction and assent of the said *Copeman*, the 16th August then next was agreed upon and appointed;" and thereupon a memorandum was drawn up by the clerk of the committee-men, and read twice before Mr. *Copeman*, which stated, that by the consent of all parties the compensation jury was to be summoned for the 16th August, Mr. *Copeman* dispensing with the notice required by the act. On the 16th August Mr. *Copeman* attended, and conducted his own case at the inquisition. The affidavits then stated that *Copeman* assumed to act as owner in fee of the land in question, and did not

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disclose, till some time after the inquisition, that he was only seised in right of his wife, and that the land was of copyhold tenure.

First point: Inquisition void for want of notice.

Humfrey now shewed cause. I. It is contended that the inquisition is void because the committee-men had no jurisdiction until "after forty days' notice in writing," but it appears on the affidavits that Mr. *Copeman* expressly waived the necessity for notice; nevertheless he applies to this Court on the ground that "no notice in writing, as prescribed by the act, had been given him." He is therefore clearly estopped from making the objection. In *Rex* v. *Bagshaw* (*a*), where the inquisition was held void for want of notice, the ground of the judgment was, that it did not appear that the parties had had any notice at all. [*W. H. Watson*, contrà, stated that he relied on three points; first, that no notice appeared on the face of the inquisition; second, that the land in question was copyhold, over which the act gave no jurisdiction at all, or at all events only upon notice to the lord; thirdly, that the inquisition ordered the committee-men to perform acts on land of *Copeman* over which they had no power. Lord *Denman* C. J. We think there is no doubt as to the notice being waived. *W. H. Watson*. The inquisition, if valid, is to bind all parties, and therefore it ought to show on the face of it that there was jurisdiction.] The inquisition could not state falsely that notice had been given, yet it is evident that a party entitled to notice may waive it if he choose. *Rex* v. *Manning* (*b*) shews that in a case of this sort it is not always necessary to state in terms that notice had been given. In *Rex* v. *Mayor &c. of Liverpool* (*c*), no notice had been given at all, and therefore the Court quashed the inquisition. In *The King* v. *The Trustees of the Norwich and Watton Roads* (*d*) the Court assumed that notice in fact had been given, but seemed to be of opinion that it ought to be set out on the inquisi-

(*a*) 7 T. R. 363.
(*b*) 1 Burr. 377.
(*c*) 4 Burr. 2244.
(*d*) 1 N. & P. 32.

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tion. This however is a different case, and rather resembles the case of an inferior jurisdiction in which notice of trial is necessary, and in which the party has waived notice under such circumstances as to estop himself from taking the objection.

II. With regard to the land being copyhold, the answer is, the committee-men knew nothing of that fact. *Copeman* assumed to be the owner of the fee, and if it turn out to be copyhold, so much the worse for the committee-men who have purchased land of an inferior tenure; and as to the rights of the lord of the manor, he does not appear at all. If he has sustained any damage he may obtain compensation.

Second point: As to the power to purchase copyhold lands under the act.

III. Lastly, the jury have properly complied with the act by assessing 56*l.* as a recompence for the damage sustained by *Copeman* in having his land taken from him. It is true that the jury have also ordered the committee-men to plant a quickset on other land of *Copeman*, which they cannot do without his permission. But that is for his benefit, and at all events, as the jury have complied with the provisions of the act, it may be rejected as surplusage.

Third point: The inquisition void for directing acts to be done, implying a trespass.

W. H. Watson, contrà. Mr. *Copeman* stands upon his legal rights. He contends that, unless the inquisition under the local act shews a jurisdiction upon the face of it, it is void. The committee-men have only jurisdiction after forty days' notice in writing, and the inquisition does not shew that any such notice was given. Their jurisdiction may be tried by this test—could any witnesses who had been summoned to attend upon an inquisition held without notice, be indicted for perjury? The short answer would be, there was no jurisdiction. It is possible that notice may be waived, but if so, the fact of waiver should appear on the inquisition, and then the question would arise. There can be no estoppel on *Copeman*, because the interests of other parties, of his wife, and of the lord, are for ever bound if this inquisition is held valid. In *The King* v. *The Trustees of the*

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Norwich and Watton Roads (*a*) notice in fact had been given, but it did not appear on the inquisition; and on the question being raised as to the necessity of setting it out, Lord *Denman* C. J. held, "I do not think it necessary to enter upon this question at length, because the *The King* v. *Bagshaw* (*b*) is a clear authority to shew that, if on the whole proceeding no notice appears, the whole proceedings are void for want of shewing jurisdiction." In *Rex* v. *Mayor &c. of Liverpool* (*c*), the argument turned entirely upon the necessity of setting out the notice in the inquisition. So also in *Rex* v. *Bagshaw* (*b*), the Court held, "if no notice were given, the trustees had no jurisdiction."

Second point.

II. The land in question being of copyhold tenure, it is very questionable whether the local act gives any power to the committee-men to purchase it. The rule as to the application of general words in statutes to copyholds is this, that when a statute alters the tenure of any estate, or does any prejudice either to the lord or tenant, the general words of the act will not extend to copyholds; but when the act is made for the public good, and no prejudice accrues to the lord, &c. copyholders are bound by it. *Co. Copyh.* s. 53; 1 *Scriven on Copyholds*, 99—110 (3d ed.), where the authorities are collected. In the present case, the lord's interest is affected, and the act is not for the public good, but is a mere private act for a particular district. If however copyholds are within this act, the lord is entitled to compensation, and it is immaterial by whom the application to quash the inquisition is made.

Third point.

III. By the act, the jury is to ascertain the sum to be paid for the purchase of the lands taken, and the judgment is to be taken for that sum. The jury in this case has directed a sum to be paid *Copeman*, and has also directed a hedge to be planted by the committee on *Copeman*'s land. It is evident therefore that the jury has considered the erection of the fence to be a necessary expense incurred by the

(*a*) 1 N. & P. 32.
(*b*) 7 T. R. 363.
(*c*) 4 Burr. 2244.

purchase, the amount therefore should have entered into the sum to be paid, whereas the committee are now directed to do an act out of their power, viz. to enter upon land not their own. It is impossible to reject this clause as surplusage, because it is evident it forms part of the consideration which the jury has awarded for the land. Again, if it be surplusage, the committee may refuse to raise the fence, and the judgment cannot be enforced against them.

Lord DENMAN C.J.—By discharging this rule, it is not to be considered that we are setting up the jurisdiction of the committee-men. After the cases cited, I think it clear that the inquisition is bad, as the want of notice is fatal. But it seems to me that Mr. *Copeman* is not competent to make either this objection or that the land is copyhold—a fact which he seems to have industriously concealed. He had full notice of what was to be done, and expressly waived the necessity of a written notice. With regard to the last point, it seems to amount to this, that the compensation awarded is larger than he is entitled to. It may be that the jury took into consideration the expenses of making a hedge, and having thrown them on the committee-men, may consequently have given *Copeman* less compensation in money. But this does not appear on the inquisition; and *Copeman* himself does not state that the compensation is one farthing less in consequence. If so, he has suffered no damage. On none of the points therefore is he in a condition to call on the Court to quash the inquisition.

PATTESON J.—The decision of the Court must not be considered an authority to shew that it is unnecessary to set out the notice in the inquisition. Whether necessary or not, Mr. *Copeman* is not the party who can raise the objection. It has been said that witnesses could not be indicted for perjury at the inquisition, but if so, whose fault is that? The same observation applies as to the land being copy-

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hold. He concealed the fact, and therefore is not entitled to take advantage of any objection arising out of it.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

Thursday, Nov. 15th.

The QUEEN *v.* The Justices of CHESHIRE.

1. On an appeal against an order of removal to the parish or township of C., the respondents took an objection to the notice of the grounds of appeal, which the Court held was valid; but on looking at the order of removal, one of the justices stated that C. was wrongly described, as there was no township of C. maintaining its own poor, but that C. was divided into three townships, each maintaining its own poor separately; the sessions held thereupon that the order was a nullity, although the respondents contended that the sessions had no jurisdiction, and that the original order should be confirmed:—Held, that although the sessions had decided the notice of appeal to be bad, their jurisdiction was not at an end, and that their order being good upon the face of it could not be quashed on certiorari.

2. Affidavits may be used to shew that an order of sessions, valid on the face of it, was made without jurisdiction.

J. EVANS, in Trinity term, 1837, had obtained a rule nisi for a certiorari to the defendants to remove into this Court all orders made by them at the Easter quarter sessions in that year, for quashing an order of removal of *William Jepson*, his wife and children, from the township of Yeardsley-cum-Whaley to the parish or township of Chapel-en-le-Frith, otherwise called Coomb's Edge, and all proceedings relating thereto.

The affidavits on which the rule was obtained stated the following facts. The original order of removal was served, on the 15th of December, 1836, on *Amos Pott*, as one of the overseers of the poor of Chapel-en-le-Frith. On the 30th of December the overseers of the removing parish (Yeardsley-cum-Whaley) were served with a notice of appeal, signed by *John Lomas* as churchwarden, and *Amos Pott* and *Joseph Marckington* as overseers of the poor "of the parish of Chapel-en-le-Frith." On the 8th of March a second notice of appeal, with the grounds of appeal, by the "churchwarden and overseer of the township, district, or place known by the name of Coomb's Edge, and sometimes called Chapel-en-le-Frith," was served on the removing parish. The second notice was signed by "*John Lomas*, churchwarden," and "*Amos Pott*, overseer."

When the appeal came on for hearing at the Easter quarter sessions 1837, the respondents called upon the appellants to prove their notice of appeal, and objected that the notice was invalid, and applied to have the order confirmed. The Court decided that the notice was invalid. The order of removal was then looked at by the Court, and one of the magistrates on the bench stated that there was no township of Chapel-en-le-Frith, but that the parish of Chapel-en-le-Frith contained three townships, Coomb's Edge, Bradshaw Edge, and Bowden Edge, each maintaining its own poor; and thereupon the Court decided that the order was misdirected and a nullity, and they quashed it; although the respondents' counsel contended that the order ought to have been confirmed, as the appellants were out of Court, in consequence of the invalidity of the notice containing the grounds of appeal, and proposed to prove that the order was in point of fact correct. It also was stated in an affidavit made by a late overseer of the parish of Chapel-en-le-Frith, that the poor of the whole parish were maintained out of one common fund.

Cottingham, in support of the order of sessions. This is an attempt to make this Court a court of appeal from the quarter sessions, which cannot be done; *The King* v. *The Justices of Carnarvon* (*a*), *The King* v. *The Justices of Monmouthshire* (*b*). It is true, that if the Court below was entirely without jurisdiction, this Court would interfere; but if there was jurisdiction, as there clearly was, this Court cannot assume the functions of a court of error. In the second case of *The King* v. *The Justices of Monmouthshire* (*c*) Lord *Tenterden* C. J. distinctly laid down this proposition: "the late decisions establish that we cannot assume to ourselves the jurisdiction of a court of error, and revise the judgments of the Courts of Quarter Sessions." [Lord *Denman* C. J. We had better hear the other side on this point.]

(*a*) 4 B. & Ald. 86.
(*b*) 4 B. & C. 844; *S. C.* 7 D. & R. 334.
(*c*) 8 B. & C. 137; *S. C.* 2 M. & R. 172.

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J. Evans and *Townsend*, contrà. This case is very different from those cited, for here the sessions were without jurisdiction. The respondents, at the hearing of the appeal, called upon the appellants to prove their notice of appeal: on its production it was found to be signed by one overseer only, and on objection being taken, the Court decided that the notice was bad. The appeal, therefore, was never duly in Court, for the notice of appeal is a condition precedent to the appeal being lodged; *The King* v. *The Justices of Oxfordshire* (*a*). One of the justices desired to see the original order, and upon reading it observed, that the order must be quashed, for it stated that the parish of Chapel-en-le-Frith maintained its own poor, which was not the case, as there were three townships within the parish maintaining their own poor separately. It was then proposed to prove that the order of removal was correct, by witnesses then present in Court, but the Court refused to hear them, and quashed the order. [*Coleridge* J. Application was made to the justices to confirm the order, therefore, according to your own shewing, they had jurisdiction up to that moment; but how could they have jurisdiction to confirm, but not to quash?] In fact they had not jurisdiction for one or the other. In *Burn*'s Justice (*b*) it is stated, "In some places, if there appears to be no appeal against the order of removal, it is confirmed by the Court and filed among the records; and although such confirmation is merely void because the sessions has no jurisdiction therein unless in the case of appeal, which here is not, yet such confirmation is also superfluous, for the order not appealed against is final without more. But it seems that unless it be upon appeal they have no power to inquire concerning removal, for that as to them is extra-judicial." [*Williams* J. I do not see what good the certiorari will do you, for if you bring up the order, it is valid on the face of it.] This is one of the cases in which the Court will look into affidavits

(*a*) 1 M. & S. 446.
(*b*) 4 Burn's Just. 1809, ed. by D'Oyly & Williams.

to see whether the sessions had jurisdiction. In *Rex* v. *The Justices of Cumberland* (*a*), where the sessions, on the ground of want of competence, refused to hear evidence of a marriage, which was a material fact before them, this Court held that they had jurisdiction, and directed a mandamus to them to hear the complaint. Affidavits were there used in order to determine the question of jurisdiction. So in *Rex* v. *St. James, Westminster* (*b*), where the question turned upon the fact of jurisdiction, and objection was made to the use of affidavits, authorities were cited to shew that the Court had often acted upon them; and *Taunton* J. observed, "it had been constantly done." The following cases are all authorities to shew that affidavits may be used: "*The King* v. *The Inhabitants of Great Marlow* (*c*), *The King* v. *The Justices of Somersetshire* (*d*), *The King* v. *The Justices of the West Riding of Yorkshire* (*e*), *The King* v. *The Justices of Yorkshire* (*f*), *The King* v. *The Justices of Buckinghamshire* (*g*), *Rex* v. *The Overseers of Bridgewater* (*h*), *Rex* v. *Wakefield and others* (*i*). With regard to the statement made by the justice, as to the parish of Chapel-en-le-Frith, it was erroneous. There are several cases in the books which shew that removals have been made to and from that parish. In a very late case in this Court, *The King* v. *The Justices of Derbyshire* (*k*), the fact of a settlement being gained in the parish of Chapel-en-le-Frith appears. It is submitted, therefore, that, as the Court may look into the affidavits, it appears that the quarter sessions, having decided that the notice was insufficient, decided in fact that they had no jurisdiction: the appeal, therefore, was not before them, and any order subsequently made relative thereto is a nullity. If the Court arrive at any other conclusion, the hardship will

(*a*) 4 A. & E. 695.
(*b*) 2 A. & E. 241; *S. C.* 4 N. & M. 252.
(*c*) 2 East, 244.
(*d*) 5 B. & C. 816.
(*e*) 5 B. & C. 818, n.
(*f*) 5 T. R. 629.
(*g*) 3 East, 342.
(*h*) 1 Cowp. 139.
(*i*) 2 Lord Ken. 164.
(*k*) 1 N. & P. 703.

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be extreme; for then the order of the sessions made on an ex parte statement, which was not evidence, and was not allowed to be contradicted, will be final. [*Cottingham* cited *The King* v. *The Justices of Abergele* (*a*).]

Lord DENMAN C. J.—This is a case which presents very peculiar circumstances, and although I cannot approve of the result arrived at by the sessions, yet this Court is always very scrupulous in interfering with their decisions. The first question is, whether they had jurisdiction over the subject-matter? They certainly had, for it was an appeal against an order of removal. It turned out that the notice of appeal was signed by one overseer only, which the sessions held to be bad. It is a fallacy to say that their decision on this point ousted them of their jurisdiction, and it may be tried by this test—could not the Court, at any time during that sessions, have granted costs? It appears also by the affidavits that jurisdiction was given to the Court below by the respondents' counsel, for they applied to have the order confirmed. It is not unnatural that the justices should ask to look at the order; and although the justices were apparently mistaken in the decision they then came to, it was their decision, and cannot be disturbed. I am not, however, prepared to say that this order would be a final decision of the question.

PATTESON J.—If the question simply were, whether the sessions had done wrong, I should have no hesitation in deciding that their conduct was very wrong, very absurd, and very inconsistent. At the same time I cannot help seeing that they had jurisdiction. It is the decision alone of the sessions which is to be regarded; what they may have said before that decision may be treated as a mere opinion, with which we have nothing to do.

WILLIAMS J.—The affidavits state that the counsel for

(*a*) 3 N. & P. 406.

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the respondents insisted that the order ought to be confirmed; it is clear, therefore, from the affidavits, that at that moment the jurisdiction was not at an end.

COLERIDGE J.—Although the rule of law may bear hard in the present case, still if it is the rule, and if that rule is found as a whole to operate beneficially to the public at large, there can be no doubt that it ought to be strictly observed. It cannot be disputed that there are many cases in which affidavits may be looked at in order to ascertain whether there was jurisdiction or not; for suppose an order made, which was good on the face of it, but which was not made by a magistrate, it is clear that this fact may be shewn to the Court. The simple question then here being whether the justices had jurisdiction, I can entertain no doubt that they had. The appeal being lodged, an objection was taken to the notice, which was held bad, and it is contended that at that moment the appeal went out of Court; but that is said without attending to the words of the act. If there had been any doubt as to the jurisdiction of the sessions, the counsel for the respondents appear to have helped them out of the difficulty, by applying to have the order confirmed.

Rule discharged.

The QUEEN v. HARLAND and others.

Friday, November 16.

A judge at the assizes may in his discretion refuse to award restitution, after an indictment for forcible entry and detainer has been found by the grand jury; and this Court has no jurisdiction to review his decision.

AT the Midsummer assizes, 1838, for the county of York, a true bill was returned against the defendants for a forcible entry and detainer of certain premises at Ripon. *Williams* J., who presided in the Crown Court, on the application of the prosecutor, then granted a rule to shew cause why a writ of restitution should not issue. Cause was afterwards shewn before the same learned judge, who, after hearing affidavits and the arguments of counsel on both sides, discharged the rule.

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Newton now moved for a rule to shew cause why a mandamus should not issue to the learned judge, requiring him to award an immediate writ of restitution, or for such other rule as the Court should deem most convenient. *Rex* v. *Hake* (*a*), and *Bac. Abr.* Forcible Entry (F), shew that after the grand jury had found the indictment, the learned judge had no discretion, but was bound to award restitution at once, under the 8 *Hen.* 6, c. 9. So, on the other hand, where a conviction for forcible entry was quashed, the Court said they had no discretionary power, but were bound to award restitution on quashing the conviction, even if the prosecutor's title to the premises had expired; *Rex* v. *Jones* (*b*). Indeed the prosecutor's title cannot be questioned on an indictment for forcible entry, but the defendants must either deny the force, or plead, under 31 *Eliz.* c. 11, that they had been in peaceable possession three years before the finding, as in *Regina* v. *Goodenough* (*c*). It seems that, when an indictment is removed, this Court has a discretionary power, *Rex* v. *Marrow* (*d*); but that may be, because a party suing out a certiorari puts himself on the discretion of the Court; the learned judge at the assizes had no right to exercise any discretion. In *Rex* v. *Wilson* (*e*), the conviction was held bad solely on the ground that the justices had convicted on their own view of the forcible *detainer*, and that there was nothing to shew that the *entry* of the defendant was unlawful.

Lord DENMAN C. J.—I am of opinion that the learned judge at the assizes had a clear discretion to award restitution or not, as he thought proper, notwithstanding the force found by the grand jury. Undoubtedly in ancient times, when parties, whether with or without title, committed acts of extraordinary violence in getting possession of property, several statutes gave very great powers to justices to meet

(*a*) 4 M. & R. 483, note to *Rex* v. *Williams*.
(*b*) 1 Str. 474.
(*c*) 2 Lord Raym. 1036.
(*d*) Cases temp. Hardw. (Lee), 174.
(*e*) 5 N. & M. 164.

the evil. They were empowered to summon a jury, and, after the finding of the force, to give immediate restitution. That is the only case in which a man may be turned out of the possession of property on a mere *ex parte* finding in his absence. But it is a mistake to suppose that the finding of the grand jury absolutely entitles a party to restitution. The very case cited of *Rex* v. *Hake* (*a*) shews that restitution is not a matter of right under such circumstances. The effect of that authority is given by the reporters in their note (*b*), namely, that though the finding of the bill is necessary to give the Court jurisdiction, a sufficient case for their interference must be made out on affidavit, as such bill is commonly found wholly, or in part, upon the testimony of the party seeking restitution. In this case a discretion has been exercised, and the Court has no power to interfere.

PATTESON J.—The sole question is, whether it was imperative on the learned judge to award restitution, as soon as the bill had been found by the grand jury. It is admitted, where an indictment for a forcible entry has been removed into this Court, that this Court has a discretion; but the reason for allowing such discretion, that the prosecutor's case is commonly made out by his own evidence, applies in one case as well as the other. The justices who visit the premises in question, and investigate the complaint by means of a jury and disinterested witnesses, may perhaps be bound to give restitution, as soon as the force is found, but the force in this case has been found in a different manner altogether.

COLERIDGE J.—I am quite of the same opinion, and should regret if any authority compelled us to interfere. If the learned judge had any discretion, this rule must be refused. Under the 8 *Hen.* 6, c. 9, the justices are to award restitution, when the force has been found. It is absurd to construe this, so as to render it imperative

(*a*) 4 Mann. & R. 483. (*b*) Page 485.

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on a judge to act on the finding of a grand jury in his own absence, and also in the absence of the parties charged, which is altogether different from an inquest taken by justices, on a view of the premises, and an examination of indifferent witnesses. This indictment has not been removed, and no authority has been cited to shew that we have jurisdiction.

Rule refused (c).

(c) In some of the books, doubts appear to have been raised whether the justices of oyer and terminer, inasmuch as they have a distinct commission from that of justices of the peace, have any power to award restitution; but see 1 Russell on Crimes, 292, and note (r).

Saturday, Nov. 17th.

After a special jury had been sworn on the trial of an indictment for misdemeanor, it was discovered that one of them had sat on the grand jury who found the bill. It was proposed that he should leave the box, but the defendants objected to this course; the trial proceeded, and they were found guilty. Under these circumstances the Court refused to grant a rule for a new trial on the ground of mistrial.

The QUEEN *v.* SULLIVAN and others.

ON the trial of an indictment against the defendants for a conspiracy, before Lord *Denman* C. J. and a special jury, at the Westminster sittings after Trinity term, 1837, one of the jury rose after the opening address of the prosecutor's counsel, and stated that it had just been brought to his recollection that he had sat on the grand jury who found the bill. It was then proposed, on the part of the prosecution, that he should leave the box, but an objection to this course was made on behalf of the defendants, and the trial proceeded. The defendants were found guilty.

Platt, on a former day (Nov. 7) in this term, moved for a new trial, on the ground that there had been a mistrial. The verdict in this case cannot be supported, as the guilt of the defendants has not been found by twenty-four jurors, namely, twelve out of the number on the grand jury, and the twelve on the petit jury. The 6 *Geo.* 4, c. 50, ss. 30, 31, and 32, relative to the striking of special juries, does not throw any light upon the present point. But *Blackstone* has this passage (*a*): "So tender is the law of England

(*a*) 4 Comm. 306.

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of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve, at least, of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial." The authority of this passage is certainly confined to juries sitting on capital charges, but the books do not warrant any such distinction; and as one of the petit jury in this case was disqualified, the defendants have been found guilty by eleven jurors only. By the 25th *Edw.* 3, stat. 5, c. 3, "no indictor shall be put on inquests upon deliverance of the indictees of felonies or trespass, if he be challenged for that same cause by him which is so indicted." The term "indictor" does not mean the prosecutor merely, but the grand jury also, from whose finding the indictment derives its existence. The exceptionable juror was not challenged by the defendants, for the objection to him was not discovered until after he had been sworn. [Lord *Denman* C. J. How do we know that?] It is of the most vital importance to the trial by jury that no grand juror, whose mind has been prepossessed by statements entirely ex parte, should be suffered to sit afterwards on the petit jury.

Lord DENMAN C. J.—The subject is certainly of great importance, and ought to be considered. At present my opinion is, that the objection should have been made the subject of challenge to the juror. If he had disclosed the objection before he was sworn he might have left the box.

Cur. adv. vult.

Lord DENMAN C. J. now gave judgment.—In this case the juror objected to was not challenged, and when it was proposed that he should leave the box the defendants refused their assent, and preferred to rely on their strict right.

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Under these circumstances we think there should be no rule.

Rule refused.

Wednesday, Nov. 21st.

CARNABY *v.* WELBY, WENDOVER and others.

Where the defendants in trespass for entering plaintiff's house and taking his goods justified under a writ of fieri facias and warrant thereon, the replication, admitting the issue of the writ and warrant, and concluding with de injuriâ absque residuo causæ, was held not to admit the seizure under them.

TRESPASS for breaking the plaintiff's dwelling-house, breaking the outer door thereof, and taking his goods. Pleas: 1. Not guilty; 2. As to the breaking the said house, that the plaintiff was not possessed; 3. That the said house was the house of *E. W.* and *E. C. W.*; 4. As to taking the said goods, that they were not the property of the plaintiff; 5. As to breaking the said house, breaking the outer door, and taking the goods, that a writ of fieri facias was directed to the defendant, *Welby*, as sheriff of Lincolnshire, against the goods of one *Bower*; that said defendant thereupon, by virtue of this writ, made his warrant to defendant, *Wendover*, as his bailiff; that divers of the goods of *Bower*, liable to be taken in execution by virtue of the said writ and warrant, were in the said dwelling-house; that thereupon they, as such sheriff and bailiff, and the other defendants in their aid and by virtue of the writ and warrant, broke the outer door because entrance was refused, and took the goods; 6. A similar plea of justification under the writ and warrant as to all the damage except breaking the outer door.

Replication to the 1st, 2d, and 4th pleas, joining issue. To the 3d, that the said dwelling-house was the dwelling-house of the plaintiff, and not of the said *E. W.* and *E. C. W.* To the 5th plea, admitting the delivery of the writ to the sheriff, and of his warrant to the bailiff in manner and form as alleged in the said plea, that the defendants committed the said trespasses de injuriâ suâ absque residuo causæ. To the 6th plea the replication was similar.

At the trial before Lord *Abinger* C. B., at the Lent assizes, 1837, for the county of Lincoln, the plaintiff, after proof of his possession and of the trespass by the defendants, went

into evidence of his title, and endeavoured to shew that he became lawfully possessed of the house under an agreement or lease executed by *Bower*, and of the goods by purchase from him. The defendants called no witnesses, but it was urged on their behalf that the transaction between *Bower* and the plaintiff was not bonâ fide, and that consequently the goods were the property of *Bower*, and were lawfully taken, and the house lawfully entered, under the execution against him. His lordship directed the jury, that it was admitted on the pleadings that the goods were taken under the writ, that the only question therefore was, whether the transaction between *Bower* and the plaintiff was bonâ fide, so as to transfer to him the property, and that, unless the jury were satisfied of this, they should find a verdict for the defendants. Verdict for the defendants.

Humfrey, in the following Easter term, obtained a rule nisi for a new trial, on the ground that the plaintiff, by proof of his possession and the trespass by the defendants, had made out a primâ facie case, which should have been answered by proof of seizure under the writ and warrant; that such seizure was not admitted, *Lucas* v. *Nockells* (*a*); and that even if the plaintiff had failed in deducing his title to the goods, the jury ought to have been directed that his primâ facie case of possession had entitled him to their verdict.

Balguy, and *Goulburn* Serjt., now shewed cause, and contended that, as the plaintiff had set up a title which had not been made out to the satisfaction of the jury, the verdict could not be disturbed; that he could not have stopped short by proof of possession, as the title to the goods was in issue, and the replication of de injuriâ absque residuo causæ admitted not only the writ and warrant but the seizure under them. [*Patteson* J. In *Heath* v. *Milward*(*b*) it was held, that evidence of possession entitled the plain-

(*a*) 10 Bing. 157. (*b*) 2 Bing. N. C. 98.

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tiff to a verdict on an issue as to his possession of the close trespassed on, although in that case, it seems, he was not contented with shewing the bare possession, but went into evidence of title also.)

Adams Serjt., and *Humfrey*, contrà. The jury were directed that the burden of proof lay on the plaintiff to prove the goods were his property, whereas it was enough for him to shew them to have been in his possession, at the time of the trespasses. Even the issue on the 4th plea, as to the plaintiff's property in the goods, was substantiated by proof of his possession, for a plea of no property means, in these cases, no property as against the defendants; *Nicolls* v. *Bastard* (*a*). Now the defendants in this case, until they had shewn that the seizure was made under the writ and warrant against the goods of *Bower*, were wrong-doers, against whom bare possession is property enough; and *Lucas* v. *Nockells* (*b*) is decisive to shew that the virtute cujus is traversable, and that the replication de injuriâ does not admit it. [Lord *Denman* C. J. In that case it was shewn that the seizure was colourable, but it was not denied that there had been a seizure of some kind.] As the defendants did not shew that they were not mere wrong-doers, their plea that the goods were not the goods of the plaintiff, put no more in issue as to the property in them than the old plea of not guilty; proof of peaceable possession by the plaintiff throws it on the defendant to justify the taking; *Ashmore* v. *Hardy* (*c*). [Lord *Denman* C. J. You chose to attempt to prove title, ought you not to have completed your case?] No, the defendants had no right to question it. [*Goulburn* Serjt., referred to the former report of *Lucas* v. *Nockells* (*d*), to shew that the replication there did not admit so much as the present replication.]

Lord DENMAN C. J.—I am unwilling to come to the

(*a*) 2 C. M. & R. 659.
(*b*) 10 Bing. 157.
(*c*) 7 C. & P. 501.
(*d*) 4 Bing. 729.

conclusion that the jury were misdirected, for I cannot but think that they have disposed of the case fairly on the merits. But the main ground for the rule is, that the learned judge told them that the seizure under the writ was admitted, and the authority of *Lucas* v. *Nockells* (*a*) shews that he was mistaken. The distinction, which I suggested, that there the seizure was not allowed to be denied altogether, but that it was merely shewn to be colourable, does not appear to be well founded.

PATTESON J.—I am sorry to come to the same conclusion. According to *Heath* v. *Milward* (*b*), the issue on the second plea was simply whether, at the time of the trespass, the plaintiff was possessed of the house; he evidently was so possessed, and it was attempted at the trial to raise the question, whether or not his possession was fraudulent. The issue on the 4th plea was, whether the goods were the plaintiff's; this issue is in terms as to the plaintiff's property, and is in that respect distinguishable from the others. The plaintiff at the trial did not rely on his mere possession, though he had better have done so than have gone on to establish his title and fail; but it may now be fairly said that he did not altogether fail as to title, and that, as his evidence on that point left the case doubtful, his claim on the ground of possession should have been allowed to prevail. Certainly after the possession of the plaintiff was once established, the defendants were in the situation of mere wrong-doers. As a matter of evidence I should say that the delivery of the writ and warrant were strong facts, but it was put in the direction of the learned judge that the seizure was admitted on the pleadings. Now the case cited (*a*) proves that it is competent to the plaintiff, under a replication like the present, to shew that a seizure was colourable; if so, it must be open to him to deny that there has been any seizure at all, and the onus would of course lie, as in this case, on the defendant, who asserts the affirmative.

(*a*) *Lucas* v. *Nockells*, 10 Bing. 157. (*b*) 2 Bing. N. C. 98.

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WILLIAMS J.—Whatever may be the case as to the issue on the 4th plea, as to the property in the goods, it is enough to entitle the plaintiff to a new trial that there has been a misdirection in this respect—that the plaintiff proved himself in possession of the house, and did not by his replication admit that which the learned judge conceived him to admit—the proceedings under the writ and warrant.

COLERIDGE J.—The whole question turns substantially on the ruling of the learned judge as to the extent of the admissions made in the replication de injuriâ &c. For the reasons given, I think he was wrong. If then it is to be taken that the seizure under the writ was traversed, it is clear that no proof of it was submitted to the jury, so that the 5th and 6th pleas may be struck out of the record. Treating the case in this view, there was possession on the one hand, and that which was a wrongful entry on the other. With reference then to proof of property, I think that the plaintiff proved enough against the defendants as mere wrong-doers. That is clear as to the house, and I think, although it is unnecessary to say so, that he proved quite property enough in the goods.

Rule absolute.

Wednesday, Nov. 21st.

BUCKTON and another, Assignees of MASON, a Bankrupt, *v.* FROST.

In trover by the assignees of a bankrupt a plea denying that they are such assignees puts in issue the petitioning creditor's debt and the act of bankruptcy.

TROVER. Plea (among others) that plaintiffs were not assignees of *Mason*, and issue thereon. On the trial before *Alderson* B., at the York Lent assizes, 1837, the plaintiffs proved the appointment of the plaintiffs as assignees. It was contended that, under the above issue, they were also bound to prove the petitioning creditor's debt and the act of bankruptcy. This they were unable to do. The learned

judge directed a verdict to be entered for the plaintiffs, and reserved leave to the defendant to move to enter a nonsuit. Verdict for the plaintiffs.

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BUCKTON and another v. FROST.

Cresswell, in the following term, having obtained a rule nisi to enter a nonsuit,

Alexander and *Wightman*, who appeared to shew cause, admitted that the very point had been decided against them by the Court of Common Pleas, in *Butler* v. *Hobson* (*a*).

Per CURIAM (*b*).—We are bound by that decision.

Rule absolute.

(*a*) 4 Bing. N. C. 290.

(*b*) Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

FENTON v. The DUBLIN STEAM PACKET COMPANY.

Wednesday, Nov. 21st.

DECLARATION, that on &c. the plaintiff was possessed of a vessel called a keel, being on the river Humber, and the defendants were possessed of a certain steam-vessel in the said river, and then, by their servants and mariners, had the care, direction, and management of the same; yet the defendants, not regarding their duty &c., on &c., by their said servants and mariners, took so little care of their said steam-vessel in the direction and management of the same, that the same, through the negligence &c. of the said servants &c., with great force struck and sunk the vessel of the plaintiff, &c. &c.

Pleas, 1. Not guilty. 2. That at the time when &c. the

A steam-vessel was under charter-party for six months, the owners to keep it in order, for the conveyance of goods &c. from Newcastle and Goole, or such other coasting station as the charterer might from time to time employ it in. The crew were appointed by the owners, but paid by the charterer, who was also to pay all disbursements. The charterer did not interfere with the navigation of the vessel, but while he was on board, through the negligence of the crew, it ran against and injured the plaintiff's keel:—Held, on action brought against the owners, that they were liable.

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defendants had not the possession of the said steam-vessel, and the care, direction, and management of the same by their servants and mariners, or otherwise, in manner as in the declaration alleged. Issue thereon.

At the trial before *Alderson* B. at the Lent assizes, 1837, for the county of York, the plaintiff having adduced evidence to shew that on the 30th October, 1835, his keel was sunk by the steam-vessel of the defendants having been negligently driven against it, the defendants put in evidence the following memorandum for a charter-party.

" 22d Sept. 1834.

" It is this day mutually agreed between the City of Dublin Steam Packet Company, owners of the good ship &c., (the steam-vessel in question,) on the one part, and *John Dails*, &c. on the other part, that the said company agree to charter with *J. D.* the said steamer for the space of six months, to be paid for same at and after the rate of 20*l.* per week, the owners to keep the vessel in good and sufficient order, for the conveyance of goods, merchandize, and passengers, to run from Newcastle and Goole, or any other coasting station, which the said *J. D.* may from time to time employ the said vessel in, the said *J. D.* to pay all disbursements incident to the working the said steamer, including harbour dues, pilotages, seamen's and captain's wages, and coals and oil, tallow &c., for engines, and to insure the vessel for 3000*l.* The policy to be deposited with the company before-named."

The memorandum then provided, that at the end of the six months the vessel might be engaged for a further period at 25*l.* a week, subject to the same payments and conditions as before. The captain of the steam-vessel then proved that he himself, the crew, and engineers, were appointed by the defendants or their agents, but that they were all paid by *Dails*, the charterer; that he obeyed the orders of *Dails* as to where the vessel was to go, but not as to the mode of navigation: that at the time of the accident *Dails* was on board, and that the vessel was going by his direction to Newcastle. It was contended that, under these circumstances, the defendants were not chargeable for the injury occasioned while the vessel was under the management of persons who were the servants of the charterer and not of the owners. Leave was given to the defendants to move to enter a nonsuit. Verdict for the plaintiff.

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FENTON v. DUBLIN STEAM PACKET Company.

Atcherley Serjt., in the following Easter term, having obtained a rule nisi,

Alexander, *Baines*, and *Wortley* now shewed cause. The owners are liable for the injury occasioned by the unskilful navigation of their vessel while under the control of their servants. The question in all cases like the present is, whose servants did the wrongful act? Clearly the servants of the company. They were appointed by the company, and the express stipulation in the charter-party was requisite to give them any claim on the charterer for wages. It may be observed also, that the owners restricted the course of the vessel to coasting, and reserved to themselves a right to enter it for the purpose of repairing, so that they had not abandoned all control over it; and the captain said he recognised in the charterer no authority to direct in what manner it was to be navigated. It is certainly most convenient for the public that the owners should be held liable, for they are easily ascertained by means of the registry. Many cases, in which the question, whether the owners or the charterers were liable to third parties, has been decided against the charterers, were cases of contract, and decided solely on the ground of the privity subsisting between them and such third parties; as *Hutton* v. *Bragg* (*a*), *Newberry* v. *Colvin* (*b*), *Reeve* v. *Davis* (*c*), and *James* v. *Jones* (*d*), which, though in form an action of tort, was substantially on an express contract with the charterers. And even in this class of cases there are many authorities that the owners are bound to pay for necessaries supplied to the ship, without their knowledge, and without their being known to the person who supplied them, *Rich* v. *Coe* (*e*). But *Fletcher* v. *Braddick* (*f*) is a direct authority upon the point now under discussion. There the ship of the defendants,

(*a*) 7 Taunt. 14.
(*b*) 7 Bing. 190.
(*c*) 1 A. & E. 312.
(*d*) Abbott on Ship. 5th edit. p. 20; *S. C.* 3 Esp. 27.
(*e*) Cowp. 636.
(*f*) 2 New Rep. 182.

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at the time of the injury complained of, was under charter to the Commissioners of the Navy, who had put on board of her a commander of the navy; he was then in command of her; and it was stipulated by the charter-party that the master and the crew to be supplied by the defendants were to be under his control. The injury was occasioned by the persons on board the defendants' ship having too much cable out, and the defendants were held to have been properly sued. It may be said that in that case the charterers were not bound to pay the wages of the crew. The distinction is, however, quite immaterial, the crew in either case were the servants of the defendants, and under their control, and if the charterer in this case had refused to pay he would not be liable to the crew for non-payment, but to the owners. In *Laugher* v. *Pointer* (*a*), where this Court was equally divided on the question whether the owner of a carriage, drawn by horses hired for the day from a stable-keeper, who supplied the driver, was liable for an injury done by negligent driving, *Abbott* C. J., who was of opinion that he was not liable, put the very case of the present defendants by way of illustration. "Let me put the case of a ship hired and chartered for a voyage on the ocean to carry such goods as the charterer may think fit to load, and such only. Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer, though he is to some purposes the dominus pro tempore;" and he proceeds to give as a reason for the invariable immunity of the charterer, that the crew had never been deemed his servants. *Littledale* J. employs the same illustration. [*Patteson* J. None of the judges in that case held that the *stable-keeper* was not liable, but merely that the hirer was not.] In *Smith* v. *Lawrence* (*b*) Lord *Tenterden* C. J. adhered to his opinion expressed in the case last cited. There

(*a*) 5 B. & C. 546; S. C. 8 D. & R. 556. (*b*) 2 Mann. & R. 1.

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the owner of a carriage hired of a stable-keeper, for the day, post horses and postilions to take him from London to Epsom; the stable-keeper was held responsible for damage occasioned by the negligent driving of his servants; *Holroyd* J., who had differed from *Abbott* C. J. in the former case, concurring in the decision. In *Dean* v. *Hogg* (*a*), where the defendant had hired a steam-boat for an excursion to Richmond, and the owner's captain was to navigate the vessel, it was held that the defendant had not such a possession as to justify the ejection of a stranger whom the captain had allowed to come on board. But *Fletcher* v. *Braddick* (*b*) is a decisive authority, and a much stronger case than this, for there the defendant's servants were to obey an officer appointed by the charterer, whilst here they had the exclusive control and management.

Atcherley Serjt. and *Wightman*, contrà. The liability of the defendants does not depend upon the facility of proof against them, but upon the nature of the contract between them and the charterer. On this the charter-party, which creates the rights and liabilities of the parties to it respectively, must speak for itself, and it cannot be controlled for this purpose by extraneous evidence. With reference then to that instrument alone, to whom was the possession and dominion of the offending vessel committed? to the charterer, undoubtedly. He is to employ it for his own benefit, "to and from Newcastle and Goole, or any other coasting station which the said *J. D.* may from time to time employ the vessel in," and he is to insure, and to pay all disbursements, and the wages of the crew. This last circumstance is most material, and the judgment of *Mansfield* C. J. in *Fletcher* v. *Braddick* (*b*), proceeds upon it. "As far as appearances went," he says, "the defendants continued the owners at the time of the loss, for they paid the master and sailors which they had put on board." In *Dean* v. *Hogg* (*a*) also, where the owners were considered to retain possession of

(*a*) 10 Bing. 345. (*b*) 2 New Rep. 182.

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the hired boat, they had to pay the persons employed in navigating it, and it was hired only to carry a party from one certain point to another. *Hutton* v. *Bragg* (*a*), *Vallejo* v. *Wheeler* (*b*), and *Scott* v. *Scott* (*c*), are authorities to shew that the defendants in this case were out of possession. The ship-owner and not the charterer has been made liable for a loss of gold sent by a ship, *Parish* v. *Crawford* (*d*); but in *Christie* v. *Lewis* (*e*) that case is treated as overruled. The ship in this case was under demise, and the crew taken with it, so that the owners were no more responsible than the owner of a furnished house, whose servants are taken with it, could be responsible for their acts as long as the house and servants were under the control of a tenant. [Lord *Denman* C. J. Suppose the vessel had been navigated so unskilfully that the charterer was thrown overboard, whom could the charterer sue?] Not the owners. The question raised by the issue is, whether the defendants were in possession, and it is clear from the demise that they had put themselves out of possession. [*Patteson* J. The charter-party says nothing about repairs, but merely that the owners are to keep the vessel in good order for the conveyance of goods &c., and the charterer is to pay all disbursements incident to the working. As I understand this it does not mean that he was to provide whatever might be wanted, but rather that the owners were to do so, and were afterwards to be reimbursed by him.]

Lord DENMAN C. J.—The question is not whether the charterer is liable, but whether the owners are. Although they have let the vessel they derive a benefit from so doing, and have chosen to engage servants of their own for the ordinary navigation of it. We must take it that the accident happened in the course of ordinary navigation; the charterer might undoubtedly have made himself liable by any interference, but nothing of this sort appears, and we may,

(*a*) 7 Taunt. 14.
(*b*) Cowp. 143.
(*c*) 2 Stark. Ca. 438.
(*d*) 2 Str. 1251.
(*e*) 2 B. & Bing. 421.

I think, hold that this action is properly brought against the owners, without impugning any previous authorities.

PATTESON J.—It is conceded that the accident happened through the negligence of the crew; so that the real question is—whose servants were they? They might for some purposes be the servants of both parties, so that the holding of *Holroyd* and *Buyley* Js. in *Laugher* v. *Pointer* (*a*), has no very certain bearing on the present issue. Those learned judges held that the hirer of the job horses *was* liable, but that does not involve a decision on their parts that the owner of them was *not* liable (*b*). It is said that the issue here is in terms whether the defendants were possessed of the vessel; it is clear that they were possessed if the servants navigating it were their servants, so that the same question recurs—whose servants were they? Looking at the charter-party itself I have no doubt they were the servants of the owners of the vessel. The charterer is to pay disbursements, but is not required to provide any thing; he is to pay wages, but is not required to appoint servants; the inference is, that the owners were to provide every thing, and to have servants of their own choosing.

WILLIAMS J.—The single question in this case, as in every other of the same kind, is a question of fact—under whose control was the vessel at the time of the injury complained of? That question is to be solved by ascertaining whose servants had the direction and management of the vessel, for there is no imputation alleged against the charterer, either of interference or negligence, at that particular time. The charter-party in itself, fairly construed, implies that they were the servants of the owners, who might consider it essential to have in their own hands the appointment of the engineer and others of the ship's com-

(*a*) 5 B. & C. 546; *S. C.* 8 D. & R. 556.

(*b*) See the judgment of *Abbott* C. J. p. 580. "It does not seem to be doubted that the injured party may sue the owner of the horses."

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pany, and the provision studiously introduced, that their wages are to be paid by the charterer, would probably have been omitted if he had the appointment of them.

COLERIDGE J.—The question turns on the language of the issue, which is, whether the defendants had the possession and control of the steam-vessel; so that evidence of the actual facts cannot be excluded, whatever may be the rights of the parties *inter se* under the charter-party. In point of fact, the crew were appointed by the owners, who therefore must be considered in possession by their servants. On the other hand, if the evidence is excluded, and the charter-party, which I admit must govern the rights of the parties to it *inter se*, be alone referred to, the same conclusion follows. That instrument shews that the owners had also a right to be in possession, and that they purposely retained in their own hands a certain dominion over the vessel chartered.

Rule discharged.

Thursday, Nov. 22d.

The QUEEN *v.* GREGORY.

Although a party applying for a criminal information must shew himself to be an innocent party, yet the Court made a rule absolute for such information against the publisher of a libel, which affected several parties, notwithstanding that the character of the person principally attacked, and on whose affidavit (among others) the rule nisi had been obtained, was impeached on shewing cause.

SIR *W. W. FOLLETT*, on a former day in this term, had obtained a rule nisi for a criminal information against the defendant for a libel published in the Satirist newspaper, wherein it was alleged that the marriage of the present Marquess and Marchioness of *Blandford* was void, and the issue illegitimate, on the ground of the Marquess having previously introduced a lady in Scotland as his wife. The rule was obtained on the affidavits of Lord *Blandford*, Lord *Sunderland* his eldest son, a minor of 17 years of age, Lord *Galloway*, brother of the present Marchioness, and others.

Counter-affidavits were filed, by which it was stated that Lord *Blandford* had, in 1817, formed a connection with a young lady of the name of *Law*, and that a simulated marriage had taken place between them, after which they lived

together as Captain and Mrs. *Lawson*, and went to Scotland, where they also lived as man and wife.

Affidavits in answer were filed by Lord *Blandford*, denying that they had ever lived together as man and wife, and stating that he had always gone by the name of Lord *Blandford*, and no other, during the time he cohabited with her.

The libel was as follows:—"Some 20 years back the Marquess of *Blandford* eloped with a lady, the daughter of a wealthy merchant, from Ireland, with whom he lived for several years—some part of the time in Scotland, where she was received as his wife. By this lady he had a daughter, now living. Assuming the Scotch contract to amount, which it does, to a valid marriage, one thing is quite clear, that the confirmation of the marriage in Scotland invalidates the marriage of the Marquess with the daughter of the Earl of *Galloway*, and bastardizes the offspring of that marriage."

Sir *J. Campbell* A. G. shewed cause on the facts in the affidavits, and also contended that by the practice of the Court, as Lord *Blandford* did not appear with clean hands in the case, he was not entitled to special protection.

Sir *W. W. Follett* and *R. V. Richards*, contrà, submitted that even if Lord *Blandford* did not stand entirely clear, there were other parties on whose behalf the application was made, and against whom no imputation rested, namely, Lord *Sunderland*, the son of the Marquess, and Lord *Galloway*, the brother of the Marchioness.

Lord DENMAN C. J.—If this application had been made on behalf of Lord *Blandford* alone, I for one would never have consented to its being made absolute. But there are other parties outraged by this libel, who are fully entitled to the protection of the Court, and on their behalf, therefore, the rule must be absolute.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule absolute.

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The QUEEN *v.* LEWIS.

1. In an order of affiliation, under 4 & 5 *Will.* 4, c. 76, s. 72, it is not necessary that the order should contain an express adjudication that *A. B.* is the father of the child; an order, following the words of the section, and stating that the justices "being satisfied" that *A. B.* is the father, is sufficient.

2. It is sufficient also that the order states generally that the child is chargeable to the parish making the application, by reason of the mother's inability.

3. Where a child became chargeable on the 6th March, and the following Easter sessions made an order that an application for affiliating the child should be deferred to the next Midsummer sessions, on account of the putative father keeping out of the way:—Held, that the order of affiliation made at the latter sessions was not too late.

BUSBY, in Michaelmas term, 1837, had obtained a rule calling upon the prosecutors to shew cause why an order of sessions, made on the 29th June preceding (hereinafter set out) should not be quashed for the insufficiency thereof.

By the order it appeared, that at the Montgomeryshire Easter quarter sessions, 1837, the following order was made:

"Penstrowed agst. Richard Lewis, } In the matter of the application of the overseers of the poor of the parish of Penstrowed for an order upon one *Richard Lewis*, of Monghtre, in the said county, to reimburse the said overseers for the maintenance and support of the female bastard child of one *Elizabeth Jones*, chargeable to the said parish, and born on the third day of October last. Whereas it appears to this Court, that owing to the said *Richard Lewis* having kept out of the way to avoid being served with fourteen days' notice of this application, the said overseers have not had sufficient time to give such notice: It is ordered, that the hearing of such application be, and the same is hereby deferred to the next general quarter sessions of the peace to be holden for this county."

At the Midsummer quarter sessions, 1837, the following order, being the one in question, was made:

"Whereas the overseers of the poor of Penstrowed did, on the 2nd day of May last, give due notice to *Richard Lewis*, late of Monghtre, in the said county, labourer, of their intention to apply to this Court for an order upon him the said *Richard Lewis*, as the putative father of a certain female bastard child, of which one *Elizabeth Jones* was then lately delivered, and which had then lately become chargeable to the said parish, to reimburse the said parish for the maintenance and support of the said child; and the said overseers having now made such application accordingly, and the said *Richard Lewis* being at the same time here present, and it being now duly proved to this Court, in the presence and hearing of the said *Richard Lewis*, that the said child was on the 25th day of October last, at the parish aforesaid, born a bastard of the body of the said *Elizabeth Jones*, and that the said child, on the 6th day of March last, by the inability of its said mother to provide for its maintenance, became, and from thence hitherto hath been, and still is, chargeable to the said parish, and that he the said *Richard Lewis* is the father of the said child, and the evidence of the said *Elizabeth Jones*

having been corroborated in divers material particulars by other testimony, and this Court having heard all parties, and being satisfied that the said *Richard Lewis* is really and in truth the father of the said child, and it appearing to this Court to be just and reasonable, under all the circumstances of the case, that the said *Lewis* should pay unto the overseers of the said parish for the time being such sum or sums of money as they have expended or may from time to time hereafter, during the time hereinafter limited, expend for the maintenance and support of the said bastard child, not exceeding the sum of 1*s.* 4*d.* per week. This Court doth therefore hereby order that the said *Richard Lewis* do forthwith pay unto the said overseers the sum of 1*l.* 8*s.* 4*d.* by them expended for the maintenance &c. of the said child to the present day, and also weekly and every week henceforth, until the said child shall attain the age of seven years (if the said child shall so long live and continue to be chargeable to the said parish), such sum or sums as shall be weekly expended by or on behalf of the said parish, for the maintenance &c. of the said child during the time last aforesaid, not exceeding the sum of 1*s.* 4*d.* in each and every week &c."

Jervis, on a former day in this term (*a*), appeared to support the order, but by consent

Busby was first heard against the order. First, this order contains no adjudication that the defendant is the putative father of the bastard child; this was clearly necessary under the old law; *The King* v. *Pitts* (*b*); and there is nothing in the 4 & 5 *Will.* 4, c. 76, s. 72, to make it less necessary now. The order in question appears to have followed the words of that section, without having observed its spirit. The proper form to be adopted in this case is given in *D'Oyly's* and *Williams'* edition of *Burn*, vol. i. p. 358, where the fact is expressly stated. *The King* v. *Kenworthy* (*c*) is an illustration of the strictness required in setting out an express adjudication. Secondly, By section 71, a bastard born after the passing of the act, is to follow its mother's settlement; it therefore should have been shewn in the order where the mother's settlement is, for *non constat* that the parish of Penstrowed is liable at all. [*Patteson* J. Belonging to a parish and being charge-

(*a*) Nov. 10th, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*b*) 2 Dougl. 662.

(*c*) 1 B. & C. 711; *S. C.* 3 D. & R. 173.

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able to a parish, are two different things. Suppose the mother had no settlement, or that she lived 100 miles from her settlement, would not her child be chargeable in the parish where she lived, and could not such parish make an application like the present?] It could only be chargeable as casual poor. Lastly, The application by Penstrowed was too late. It appears that the child became chargeable to the parish on the 6th March, whereas the application for an order on the defendant is made at the ensuing Midsummer sessions, which were not the next practicable sessions, and therefore, on the authority of *Rex* v. *Heath* (*a*), the application was too late. [Lord *Denman* C. J. In *Rex* v. *Heath* (*a*) there was a direct negative of any search having been made for the father. It is a question of evidence for the sessions, and it appears, on application being made for an order at the Easter sessions, the Court ordered the application to stand over on that account.]

Jervis, contrà. It is admitted that under the old law this would be a bad order, according to the authority of *Rex* v. *Pitts* (*b*) and *Rex* v. *Perkasse* (*c*), but under the present statute the order substantially follows its provisions. In *Chitty's* edition of *Burn*, a form like the present order is given. [*Coleridge* J. The order does not positively aver that the sessions are satisfied that the defendant is the father. *Patteson* J. The form in *Chitty's Burn* (*d*) contains an express adjudication that the defendant is the putative father.] There are no cases on the point except *Rex* v. *Pitts* (*b*), which is on the old law. With regard to the other point, it clearly cannot be necessary to remove the mother to her distant settlement parish, if her child happens to become chargeable. [*Coleridge* J. The question is, whether the form of order adopted in the present case is suitable to the case of casual poor, for it is to enure for seven years.] If

(*a*) 5 A. & E. 343.
(*b*) 2 Dougl. 662.
(*c*) 1 Sid. 363.
(*d*) Vol. i. p. 384, 28th ed.

the child were afterwards to be removed to its settlement parish, it would cease to be chargeable. *The Queen* v. *Toke* (*a*) shews that the Court will put a reasonable intendment on an order.

Cur. adv. vult.

Lord DENMAN now pronounced the judgment of the Court.—We are of opinion that this order of filiation, made by the Court of Quarter Sessions, is good. (His lordship then stated the order.) We disposed, during the argument, of the objection that the Court did not appear to be the next sessions, but two other objections remain for consideration. The first is founded on the authority of *Rex* v. *Pitts* (*b*), which requires an express adjudication by justices of the peace, of every fact material to give them jurisdiction: the second is that, though the child is said to have become chargeable by reason of the mother's inability to maintain it, the particular facts from which the inability results are not found by the Court.

The first objection is two-fold: First, It does not *adjudge* the defendant to be the father, but only states the Court to be *satisfied* of that fact. We think the words of the statute an answer to this objection. However strictly it may be proper to employ the regular legal terms in the proceedings of courts of justice, these are what the statute supplies for that purpose. But, secondly, this satisfaction is not directly alleged, the order only saying, that the Court "being satisfied," makes the order. This we think a sufficient allegation. *Rex* v. *Pitts* (*b*) and the earlier cases do not depend on the grammatical form in which facts are found, but on their not being found at all. The objection, that the circumstances, which prove the mother's inability (which may be various), do not appear in the order, is also removed, we think, by the statute. The Court of Quarter Sessions must receive credit for having been convinced by proof of some such circumstances. It

(*a*) 3 N. & P. 323. (*b*) 2 Dougl. 662.

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might be more convenient for parties to be apprised of the means by which they arrive at their conclusion, but the act mentions the conclusion of fact only, and does not require these particulars to be set out.

Rule discharged.

The QUEEN *v.* The Select Vestry of ST. MARGARET'S, LEICESTER.

Thursday, November 22d.

1. When a select vestry was directed by a local act to lay a church-rate, which was to be collected in a special manner, and which was made the subject of appeal to Quarter Sessions, held, that the Court of Queen's Bench had jurisdiction to enforce the making the rate by mandamus, although a section of the act contained a saving clause, that nothing in the act was to abridge or control the rights of any person having ecclesiastical jurisdiction over any matter or thing concerning the churches of the parish.

2. It is no ground of objection to a mandamus that a requisition is made on parties in the alternative to do one of three things, if the duty enjoined by act of parliament forms one of them, and there has been a general refusal to comply with such requisition.

3. When the making a church-rate is enjoined on a special vestry by act of parliament, a colourable adjournment for the purpose of delay is equivalent to a distinct refusal, and therefore when a vestry was assembled on the 8th June to consider a requisition of the churchwardens to make a church-rate, and they had notice that on refusal a mandamus would be applied for; and at the meeting a resolution was passed, that the churchwardens ought to supply an estimate of the expenses required, and the vestry adjourned for ten days; the Court thought this a colourable adjournment, and awarded a mandamus.

BALGUY, in Trinity term last (June 12th), had obtained a rule calling upon the defendants to shew cause why a mandamus should not issue directed to them, commanding them to lay a rate for the support and repair of the churches and burial-ground of the parish of St. Margaret's, Leicester, and for defraying all the expenses incident thereto or connected therewith, and for other purposes to which church-rates are by law applicable for the present year.

The affidavits upon which the rule was obtained stated the following circumstances:—The defendants, who are the select vestry elected under 2 *W.* 4, c. x. (local and personal) (*a*)

(*a*) Intituled "An Act for better Assessing and Collecting the Poor and other Parochial Rates, &c. of the Parish of St. Margaret, in the Borough and County of Leicester."

Sect. 39 enacted, "that it shall be lawful for the select vestry, and they are hereby authorized and required from time to time, as often as occasion shall require, to tax and assess upon all and every the tenants and occupiers of houses, lands, tenements, and other hereditaments and premises within the said parish, according

came into office on the 30th April, 1838. At a meeting of the select vestry on the 21st May following, the churchwardens presented to them a requisition, in which, after setting

to the respective annual value thereof, rates for the maintenance and relief of the poor of the said parish, and for defraying all expenses incident thereto or connected therewith, or for any purpose to which poor-rates are or shall by law be applicable, *and rates for the support and repair of the churches* and burial-ground of the said parish, and for defraying all the expenses incident thereto or connected therewith, or for any purpose to which church-rates are or shall by law be applicable."

Sect. 65 enacted, "that whereas by the several laws now in force churchwardens and overseers of the poor, in the execution of the duties of their office, may incur expenses, or be liable to payments for the raising or payment whereof they may by law levy special and distinct rates, or may apply money raised by them for the relief of the poor, the select vestry shall and they are hereby required, on the demand of the said churchwardens and overseers, or the major part of them, to pay and advance to such churchwardens, or to reimburse to them, out of the rates for the relief of the poor to be raised or received by virtue of this act, all sums of money to the payment of which the said churchwardens and overseers of the poor shall or may be liable by law, or which they shall have lawfully incurred or paid in the execution of their office, and for the payment and reimbursements of which the said churchwardens and overseers might lawfully have raised any special and distinct rate if this act had not been passed, or might have applied any money raised by them for the relief of the poor."

Sect. 68 and 69 provided for the recovery of all rates made under the authority of the act from persons refusing to pay by distress, sale, and imprisonment.

Sect. 77 authorized the select vestry to remit rates on account of poverty.

Sect. 92 gave an appeal against any rate to the select vestry.

Sect. 93 gave a further appeal to the quarter sessions.

Sect. 103 was as follows:—"Provided always and be it further enacted, that this act or anything herein contained shall not extend or be construed to extend to invalidate or avoid any ecclesiastical law or constitution of the Church of England, or to destroy or in anywise abridge or control any of the rights or powers of the Lord Bishop of Lincoln, or the prebendary of the prebendal church of the said parish of St. Margaret, or of any other person or persons having ecclesiastical jurisdiction in or over the said parish, or in any manner to affect the jurisdiction of them or any of them in or over the said parish, or in or over any matter or thing concerning the churches of the said parish, or the minister thereof."

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out the clauses requiring the special vestry to levy a rate, and reciting that the select vestry for the previous year had refused or neglected, during such year, to make any church-rate, or to advance to the late churchwardens any sum for defraying the expenses which they had incurred in the execution of their office, and that the present churchwardens had immediate occasion for money for the repairs of the church; they thereupon required them to make a church-rate of 2*d.* in the pound, or at and after such other rate in the pound as the select vestry should see fit, or they required them to pay and advance to the churchwardens out of the poor-rate an adequate sum for the necessary repairs of the churches, and for such other purposes as a church-rate is by law applicable to; and they then gave them notice, that if the select vestry refused to comply with the requisition, the churchwardens intended to apply for a mandamus.

The affidavits then stated, that notice of a meeting of the select vestry, in consequence of this requisition, was given for the 4th June, but in consequence of only four select vestrymen out of twenty-nine attending, no business could be done, and the vestry was adjourned to June 8th. At the adjourned meeting of the select vestry on the 8th June, a resolution being proposed and seconded for a church-rate of 2*d.* in the pound, an amendment was carried to the following effect:—"That, as for several years past charges have been introduced into the churchwardens' accounts which this vestry consider to have been illegal, the churchwardens be now requested to furnish each member of this vestry with a copy of the items of the expenditure they contemplate in the rate they now ask for, and that this vestry do adjourn for the future consideration of this question to Monday evening the 18th June instant." The affidavits then stated, that previously to such resolution being put, the churchwardens stated their inability to enter into a minute detail of the particulars of the expected expenditure, but that probably 200*l.* or a greater sum would be required; and that they could not employ a surveyor to make an estimate

without incurring expense. It was then stated that a rate of 2*d.* in the pound was absolutely necessary for the repairs of the church, and that in deponent's belief the select vestrymen neglected to attend the vestry on the 4th June wilfully and collusively for the purpose of delay, and facts were set out shewing that the select vestry for the preceding year had refused to make any church-rate at all, and that seven of the late vestrymen were members of the present vestry; and the deponents stated their belief that the present select vestry were desirous of procrastinating the matter in question, without coming to a distinct refusal to levy a church-rate, with a view of again defeating the demand. These affidavits were sworn June 9th, 1838.

The affidavits in answer stated, that the day (June 4) on which the select vestry was appointed to meet, had been fixed inadvertently on Whit Monday, on which day the engagements of the members did not allow them to attend. And that on the 8th June the select vestry thought it was their duty, under the act of parliament, to consider the demand of the churchwardens for a rate; and that, in order to do so, some kind of detailed estimate should be laid before them, and that they did not require any minute detail of the particulars of the proposed expenditure. It was also stated to be believed, that the churchwardens could easily have furnished the statement required, and that divers illegal items had been incurred and charged to the rate by the preceding churchwardens. It was then averred, that the adjournment was for ten days only, in order to afford the churchwardens an opportunity to afford such information, and that the select vestry had not refused, and were willing to take into consideration the requisition of the churchwardens, provided the latter would have furnished them with the requisite information. It was also stated, that a parish meeting had been held, attended only by rate-payers, at which the affidavits of the churchwardens were read and statements made of the reasons of the select vestry for the course pursued; and that at such meeting a vote approving of their conduct was passed, and requesting them to

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resist every endeavour to deprive them of a discretion on the part of the rate-payers.

Sir *J. Campbell* A.G., *Waddington*, and *Mellor*, now shewed cause. Although a church-rate is a matter of ecclesiastical cognizance, *Rex* v. *Churchwardens of St. Peter's, Thetford* (*a*), yet it is admitted that, when a church-rate is directed to be levied by act of parliament, and there is no saving of ecclesiastical jurisdiction, the temporal courts have jurisdiction over it. But the local act in this case contains a clause (*b*) with an express saving of the jurisdiction of the Ecclesiastical Courts; it is therefore exactly like the case of *Rex* v. *St. Margaret's, Westminster* (*c*), where there was a question on the 9 *Anne*, c. 22, and the 10 *Anne*, c. 11, s. 24, which contained a similar saving clause; and Lord *Ellenborough* C.J. held that, though they would compel the vestry to put in motion their functions *in ordine ad*, the Court could not order them to make a church-rate, which was still of ecclesiastical cognizance only. On the merits of the case also it is submitted that there is no ground for a mandamus. If indeed the proceedings of the vestry had been merely colourable with a view to delay, it might be said that there had been a refusal to comply with the requisition; but the facts clearly exclude any such presumption. The first meeting was adjourned in consequence of the negligence of the churchwardens themselves, and the meeting held on the 8th June was in reality the first legal meeting. At that meeting the vestry require a reasonable estimate of the proposed expenditure, which not being given, they adjourn for ten days only, in order to get from the churchwardens information upon which they can properly act. Illegal payments had been made in former years by the churchwardens out of the rates, and it was the opinion of the vestry that the same course was intended to be pursued in the present year. It cannot be contended that the churchwardens have the power of calling for any amount of church-rate they

(*a*) 5 T. R. 364.
(*b*) See s. 103, *ante*, 117, n.
(*c*) 4 M. & S. 250.

please, and that the select vestry chosen by the rate-payers are forthwith, and without examination, to comply with their demand. The 39th section of the local act clearly contemplates a discretion to be exercised by the vestry, both as to the necessity and amount of the rate. The select vestry are bound to inquire into the reasonableness of the demand.

Lastly, the requisition was in the alternative; and it is submitted that, before coming to the Court for a mandamus, the churchwardens ought to have pointed out the specific duty which they required the vestry to perform, and not to have presented for their immediate choice three alternatives, one of which was clearly illegal, and another doubtful, for to advance a sum out of the poor-rate was not warranted by law; and to levy a rate of 2*d.* in the pound would produce twice as much as was required by the necessities of the churchwardens; and to the exercise of the only remaining alternative, estimates from the churchwardens and consideration on the part of the vestry were essential. Most improper haste has been exhibited in coming to the Court for a mandamus.

Balguy, contrà. The short answer to all that has been urged is, that the affidavits of the churchwardens charge the vestry with colluding together for the purpose of defeating a rate, and the vestrymen who have made affidavits in answer have not denied it. Indeed, it was impossible that they should, because from the conduct of the preceding vestry their intention to cause delay from time to time upon every possible pretext was obviously to be inferred. The churches are out of repair, which is not denied. The case of *Rex* v. *St. Margaret's, Westminster* (*a*), is distinguishable, and cannot govern this case. The vestry here, notwithstanding the saving of the ecclesiastical jurisdiction, cannot be considered in the same light as churchwardens and parishioners at common law, for many special powers are provided by the local act for the recovery of the rates

(*a*) 4 M. & S. 250.

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when made. The adjournment was in effect a refusal, and the various excuses presented by the affidavits in answer do not afford ground for coming to any other conclusion.

Lord DENMAN C.J.—This is an application for a mandamus on a local act of parliament, which requires the special vestry to make a rate for the support and repair of the church, &c. It appears by the affidavits that the special vestry of former years had been in the habit of refusing to make this rate, and that the churchwardens, believing the present select vestry would adopt the same course, presented to them a requisition in the alternative, requiring them either to make a rate, or to advance the churchwardens a certain sum out of the poor's-rate. On that requisition it appears that the select vestry have not come to any determination; and the question for us to determine is, whether there has been a refusal to comply with the requisition. It has been admitted that, if the proceedings of the select vestry were merely colourable, they are equivalent to a positive refusal, and, looking at all the circumstances of the present case, I think they were colourable. The select vestry do not deny that they are pursuing the same system of procrastination which is alleged against the late vestry, but they state that the churchwardens refused to give any estimates of the costs of the repairs. I think, however, that a satisfactory answer may be given to that objection, viz. that if the churchwardens had employed a surveyor to make an estimate costs would have been incurred, which would have required a retrospective rate. The facts then are, that the vestry meet on the 8th June, and adjourn themselves to the 18th June, that is, to a day after term, when it is too late to obtain the assistance of this Court.

The next question is, to what extent the rule should go, for if the authority of *Rex* v. *St. Margaret's, Westminster* (*a*), is to be followed, the writ should only command the special vestry to assemble; but I think our authority is not so limited, for if the act of parliament imposes on the

(*a*) 4 M. & S. 250.

select vestry a temporal duty, it is incumbent upon this Court to enforce the performance of it, if a refusal be made.

PATTESON J.—I am of the same opinion. It is not necessary to go through the facts, but I think they shew that there was a distinct refusal. With respect to *Rex* v. *St. Margaret's, Westminster* (*a*), it is to be observed, that in that case there was no special body, and the 9 *Anne*, c. 22, left the parties by whom the church-rate was to be made the same as at common law. Whether the Ecclesiastical Courts in the present case have any jurisdiction over the special vestry, it is not necessary to inquire, because the saving of their powers by sect. 103 cannot oust this Court of its jurisdiction, which arises on the act of parliament.

WILLIAMS J.—On the subject of jurisdiction, I think it is clear that the local act vests it in this Court. All the clauses shew that the rate to be made by the special vestry is a matter of temporal cognizance, and by sect. 93 an appeal to the Quarter Sessions is given.

COLERIDGE J.—Three grounds are taken to shew that this writ should not issue; first, that the matter is one of ecclesiastical cognizance; second, that the requisition being in the alternative is bad; third, that no absolute refusal has been made. The last point has been exhausted; and I will add this only, that it would have been satisfactory to have seen, when the adjournment was made for the alleged purpose of getting estimates, that some step was taken by the select vestry towards meeting the demand for the repairs, which it is not denied were absolutely necessary. With regard to the requisition being in the alternative, if a party is applied to to do one of two things, and he distinctly says he will do neither, although one of them may be illegal, how can it be said that the refusal to do either is not sufficient ground for a mandamus? The question as to jurisdiction is one of more importance. I do not think it is necessary to touch

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the case of *Rex* v. *St. Margaret's, Westminster*(*a*), or to distinguish between the saving clauses in the two acts, because it is much better to avoid subtle distinctions. But it is clear that the saving clause in the present act must go upon the intention of the authors of the act, and must be interpreted according to its subject-matter. Now sect. 89 of the act directs the church-rate to be made by the select vestry, which is a mode unknown to the common law. Then sect. 68 gives powers of collecting the rate different from those which exist in the case of an ordinary church-rate. Sect. 77 again gives the select vestry power of remitting rates; and lastly, sect. 93 gives an appeal to the Quarter Sessions. It is quite clear, therefore, that sect. 103 is not open to the large interpretation which is claimed for it. Whether upon its proper construction the spiritual courts have jurisdiction or not, we need not now inquire, as at all events it is clear that this Court has the power to interfere.

Rule absolute (*b*).

(*a*) 4 M. & S. 250.

(*b*) A writ of mandamus having issued to the select vestry, a meeting was held in consequence, at which a demand was made for estimates, to decide upon the amount of rate, which the churchwardens declined to furnish; upon this the vestry refused to make the rate, and made a return setting out the above cause of their refusal. *Balguy* having obtained a rule to quash the return for insufficiency, Sir *J. Campbell*, A. G., and *Mellor* showed cause against it in Hilary Term, 1839, and the Court held that, as the cause alleged might be a good answer to the writ, it could not be discussed on a motion.

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Devise of a freehold estate to *E. H.* for life, and after her death "my will is, that my said freehold shall be sold by my executors in trust:" held not to give the fee to the executors, but only a power.

DOE on the demise of HENRY HAMPTON *v.* SHOTTER.

EJECTMENT for premises at Frensham, in the county of Surrey. At the trial at the last Surrey assizes, at Guildford, before Lord *Denman* C. J., the lessor of the plaintiff claimed as the surviving executor under the will of his late father, dated August 7, 1800. By this will the testator appointed his sons, *Henry Hampton* and *William Hampton*,

his joint executors, and after giving to his wife, *Elizabeth*, his freehold estates and all his personalty for life, devised as follows: "and after the decease of my said wife, *Elizabeth Hampton*, my will is, that my said freehold, called &c., also all my household goods &c., shall then be sold by my said executors in trust, and all the money to be equally divided between all my children or their heirs." The testator died in 1802. The counsel for the defendant objected that the words of this devise gave only a power to the executors, and not the fee; the Chief Justice being of this opinion nonsuited the plaintiff, reserving leave to move to enter a verdict for him.

Wordsworth, on a former day (*a*) in the term, moved accordingly. It is clear that if a man devises his lands to his executors to sell, they take a fee (*b*). It was stated by *Hale* C. B., in *Barrington* v. *The Attorney-General* (*c*), that it had been held, that if a man devises that his lands shall be sold by his executors for payment of his debts, that will give the executors an interest as well as if he had devised his land to his executors to be sold. So in *North* v. *Crompton* (*d*), where the testatrix appointed *H. N.* executor of her will, and gave all her estate to dispose of for the payment of her debts to her executor, it was held that the fee passed. *Doe* v. *Willan* (*e*) is also in point; and all the cases are collected in 1 *Sugd.* on Powers (*b*), and *Watk.* on Convey., 235, (7th ed.).

Cur. adv. vult.

Lord DENMAN C. J. on this day stated, that on looking into the will it was clear that the will did not devise the land to the executors, but gave a mere power only.

Rule refused.

(*a*) Nov. 6th, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

(*b*) 1 Sug. on Powers, 128. 6th edition.

(*c*) Hardres, 419.

(*d*) 1 Chan. Ca. 196.

(*e*) 2 B. & Ald. 84.

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MURLEY *v.* SHERREN, GREENHAM and another.

At law it cannot be shewn that a fine levied by a lunatic was void on account of fraud.

TRESPASS quare clausum fregit. Plea, that the several closes, &c. were the soil and freehold of the defendant *Greenham*.

On the trial at the last Somersetshire assizes, before *Coltman* J., it appeared that the land in question had originally belonged to one *Edward Thomas Murley* (the uncle of the plaintiff), who, by a deed of 1805, had conveyed it to a person of the name of *Templeman*, and had then levied a fine thereof to the use of *Templeman*. In July, 1822, the defendant *Greenham*, who was half-brother of *Edward T. Murley*, sued out a commission *de lunatico inquirendo* against him, under which he was found to have been a lunatic for thirty years preceding, and *Greenham* was appointed committee of his estate. After the finding on this commission, proceedings were instituted in Chancery by *Greenham* against *Templeman*, to recover some of the lunatic's property; but the suit was finally compromised, and an arrangement entered into, by which *Templeman* was to retain one-third of the property, and to convey the remainder to *Greenham* for the use of the lunatic. *Templeman* conveyed accordingly, by deeds of lease and release, in 1828. The plaintiff claimed as heir at law of the lunatic, who died on the 13th February, 1838. The defendant *Greenham* claimed as devisee under a will made by the lunatic about ten days before his death: he also claimed as the owner of the legal estate under the conveyance from *Templeman*. The case opened by the plaintiff was, that *Templeman* had fraudulently persuaded the lunatic to convey away his property to himself, and that the conveyance between *Templeman* and *Greenham* was a fraudulent arrangement to deprive the heirs of *Murley* of the property. The learned judge held that the fine in 1805 passed the lunatic's estate, that, even if it were made in fraud of the lunatic, it was immaterial on the present issue, and that the convey-

ance, in 1828, to the defendant *Greenham*, proved the issue, unless it could be shewn that the conveyance was obtained by fraud on *Templeman*, and he thereupon directed a nonsuit to be entered.

Erle, on a former day (*a*) in this term, moved to set aside the nonsuit. It is true that a fine levied by a lunatic is binding on his heirs (*b*), but as equity will relieve against fines so levied, and decree a re-conveyance, *Addison* v. *Dawson* (*c*), the plaintiff should have been permitted to shew at the trial that a fraud was committed on the conusor, and that the whole transaction was void. The learned judge required that the deed of 1828 should be shewn to be a fraud on *Templeman*, in order to disprove the plea; but that of course could not be done, as the plaintiff's case was that the fraud had been committed by *Templeman* and *Greenham* jointly.

Cur. adv. vult.

Lord DENMAN C.J. on this day delivered the judgment of the Court. After stating the facts, his lordship continued thus:—On this title the defendants relied to make out their plea, it being settled law that if a lunatic levies a fine, neither he nor those who represent him shall avoid it; *Beverley's* case (*d*). Mr. *Erle*, for the plaintiff, contended that he might impeach these transactions by shewing fraud practised on the alleged lunatic. The learned judge, however, stated that no effect was to be given to any such evidence, unless he was prepared to shew fraud practised by *Greenham* on *Templeman*; for that *Templeman's* title under the fine must be taken to be good in law; and therefore the only deed open to impeachment was the conveyance from *Templeman* to *Greenham*.

This ruling, upon which the learned judge acted in his

(*a*) Nov. 6th, before Lord *Denman* C.J., *Patteson*, *Williams*, and *Coleridge* Js.

(*b*) See Bac. Abr. Fines and Recoveries, 645-6.

(*c*) 2 Vern. 678.

(*d*) 4 Rep. 124.

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summing up was the ground of the application; and it was argued, that although at law the fine of the lunatic might not be liable to impeachment, on the ground of the lunacy of the conusor, yet as this might in effect be done in equity (for which *Addison* v. *Dawson* was cited(*a*)), the plaintiff ought to have been permitted to shew that the whole transaction was void.

We are of opinion, however, that the ruling of the learned judge was perfectly right: we express no opinion as to the relief which a court of equity may be competent to give; but it is of great importance that a court of law should proceed on legal principles, and not be induced to depart from them by any hardship in the particular case. At law the fine is valid, and nothing has been done to avoid it—full effect therefore must be given to it. The result is, that *Templeman* was competent to convey a good legal title to *Greenham;* and no evidence was tendered to shew that as between these two he had not done so. There must be therefore no rule.

Rule refused.

(*a*) 2 Vern. 678.

The QUEEN *v.* The DEPTFORD Pier Improvement Company, on the prosecution of C. W. COLLIER.

Thursday, Nov. 22nd.

Where a local improvement act enabled a company to purchase lands, and contained the usual clauses for a compensation jury, and also enacted, that in case the person to whom the compensation should be awarded should not be able to make a good title to the premises, it should be lawful for the company to pay the money into the Bank of England in the name of the accountant-general: Held, that when the company, after an award made (in consequence of a difference as to the purchase-money) had objected to the title of the purchaser, the purchaser was not entitled to a mandamus to the company to pay the purchase-money into the Bank, unless he distinctly shewed to the Court that he could not make out a good title.

PLATT had obtained a rule in Trinity term last, (June 13th,) for a mandamus to the Deptford Pier and Improvement Company, calling upon them to shew cause why a mandamus should not issue to them to pay to the plaintiff, *Collier*, two sums of 1320*l.* and 750*l.* 5*s.*, awarded by the jury afterwards referred to; or otherwise to pay to him the sum of 750*l.* 5*s.*, and pay the sum of 1320*l.* into the Bank

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of England, in the name and with the privity of the Accountant-General of her Majesty's Court of Exchequer, to be placed to his account to the credit of the parties interested in the lands, tenements and hereditaments in question in this cause.

The Company had served *Collier* with a notice, as required by the act under which the Company was incorporated, *5 Will.* 4, c. xiii. (local and personal), that they should require, for the purposes of their act, certain messuages at Deptford, which were in his possession, and of which he represented himself to be seised in fee simple. The Company were afterwards desirous of withdrawing from this notice; but *Collier* insisted on their purchasing the property to which the notice related; and as the parties were unable to agree as to the amount of the purchase-money, a jury was impanelled under the provisions of the act in November, 1837; and this jury assessed 1320*l.* as the value of the hereditaments, and 750*l.* 5*s.* as the amount of compensation to be paid to *Collier* for injury, damage &c., in consequence of his property being taken by the Company.

In January, 1838, an abstract of *Collier's* title was forwarded to the solicitor of the Company; and, in March following, certain requisitions were sent to *Collier's* solicitors, among which was the following:—"The will of *J. L.* should be produced, and also evidence of the death and intestacy of *J. Roe* (who was a former owner of the property), and of the descent from him to *James Stephens* (who succeeded *J. R.* in the possession of the property, and which was stated to have descended to him as first cousin and heir at law of *J. Roe*)."

On the 30th of March, *Collier's* solicitors returned an answer to the solicitor of the Company, in which were the following passages:—

"We have been considering the requisitions you sent us on the abstracts of title we forwarded to you, and have been making inquiries with respect to such of them as, in our opinion, you are entitled to insist on being complied

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with; and we find, with regard to the pedigree of *James Stephens*, that we are not in a situation to furnish the necessary documentary evidence to establish the same. As this is the only requisition we foresee any difficulty in clearing away, we think it right at once to grapple with it; and if you intend to make a stand, on the part of the Company, that the pedigree in question should be established in the usual way, we beg to suggest that the Company should immediately pay the whole purchase-money for the freeholds into the Bank, as provided by the 77th section of the act, and which will be *the means of saving much unnecessary expense*, and at the same time afford protection to all parties. * * * * We beg to add, that notwithstanding the vendor is unable to furnish the necessary documentary evidence to establish *James Stephens*'s pedigree, yet that we consider Mr. *Collier*'s title (even were it considered only as a possessory one) to be sufficient, and such as the Company ought to be satisfied with."

The Company declined to act upon the above suggestion of paying the money into the Bank (*a*).

(*a*) By the Act by which the Company was incorporated, 5 *Will.* 4, c. xiii. which received the royal assent on the 12th of June, 1835, the Company were empowered to purchase the lands mentioned in the Schedule, which comprised the lands in the possession of *Collier*.

Sect. 60 enacted, that if the parties interested in the lands required by the Company should refuse to accept the purchase-money or other compensation offered by the Company, or should refuse to treat, or should not agree as to the amount of compensation, or should be under personal disability, or *should not produce or evince a clear title* to the premises they might be in possession of, or to the interest they should claim therein, the directors of the Company should, and they were thereby empowered *and required* to, issue a warrant to the Sheriff of Kent, to summon a jury, which jury was to assess the sum of money to be paid for the purchase of such lands, &c., and also a separate sum of money to be paid by way of recompense and compensation for damages.

Sect. 68 enacted, that upon payment or legal tender of the money which should have been agreed for between the parties, or assessed by a jury, to the persons entitled to receive it, or if the person so entitled or interested could not be found, or *should not be able to make a good title to the premises*, then,

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Thesiger and *Twells*, now shewed cause against the rule. Before the Company can exercise the power given to them by the 77th section, it must be ascertained that the circumstances exist which authorize the payment of the money into the Bank of England, as therein-after directed and required, for the use of such person, it should be lawful for the said Company and their directors, agents, servants or workmen, thereupon and not before, to enter upon and take and use such lands, tenements and hereditaments respectively, and then and thereupon the said lands, tenements and hereditaments, and the fee simple and inheritance thereof, if freehold, and the absolute estate and interest of it, if leasehold, and all the estate, use, trust, and interest, of any body or person therein, should from thenceforth become vested in and be the sole property of the said Company, to and for the purposes of this act, for ever; and such tender, payment or investment should not only bar all right, title, interest, claim, and demand, of the person by whom the same should or ought to have been made, but also should extend to and be deemed and construed to bar the dower of the wife of every such person, and all estates tail and other estates in reversion and remainder of his issue, and of every other person whomsoever therein.

The 74th, 75th, and 76th sections, provide for the payment of the purchase-money for lands in settlement, and belonging to persons under any personal disability. The 74th section directs, that in such cases where the purchase-money amounts to or exceeds 200*l.*, "the same *shall* with all convenient speed be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account there, Ex parte 'The Deptford Pier and Improvement Company.'" The 75th section directs, that where the purchase-money shall amount to 20*l.* but be less than 200*l.*, "the same *shall*, at the option of the body or person for the time being entitled to the rents and profits of the lands, tenements or hereditaments, so purchased, taken or used, or of his guardian or committee, in case of infancy, idiotcy, lunacy, or any other incapacity, with the approbation of the directors of the said Company, to be signified in writing under their common seal, be paid into the Bank of England, in the name and with the privity of the said Accountant-General of the Court of Exchequer, and be paid to his account as aforesaid, in order to be applied in manner hereinbefore directed, or otherwise the same *shall be paid*, at the like option, and with the like approbation, to two trustees;" and the 76th section directs, that where the purchase-money shall be less than 20*l.* the same *shall be* applied to the use of the body or person who would for the time have been entitled to the rents and profits of the lands so purchased by the said Company.

The 77th section, which pro-

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stances of the case are such as are provided for by the section. Unless the plaintiff is "not able to make a good title," the Company have no right to pay the money into the bank. At present there are no affidavits that a good title cannot be made, nor is there any other evidence to prove that circumstance. And even if the Company would be justified in this case in paying the money into Court, they are not bound to do so merely because a vendor with a bad title may wish them to adopt that course. The power is given to the Company to protect them from the consequence of purchasing land without a title, but it leaves them the option of rejecting a purchase where a good title cannot be obtained by other means. The time within which these powers are to be exercised is limited by the 53d section to three years, and that time having now expired, the Company would obtain no protection by paying the

vides for the payment of the purchase-money for hereditaments to which a good title shall not be shewn, directs, that in case the body or person to whom such sum of money shall be so ordered, awarded or agreed to be paid, for the purchase of any lands, tenements or hereditaments, to be purchased, taken or used, under or by virtue of the powers of the act, shall refuse to accept the same, or *shall not be able to make a good title to the premises*, or shall refuse to execute a conveyance, or in case the person to whom such sum of money shall be so awarded to be paid as aforesaid cannot be found, or if the person entitled to such lands, tenements or hereditaments, be not known or discovered, then and in that case *it shall be lawful* for the said Company, or their directors, to *order* the said sum of money, so agreed or awarded to be paid as aforesaid, *to be paid* into the Bank of England, in the name and with the privity of the Accountant-General of the said Court of Exchequer, to be placed to his account, to the credit of the parties interested in the said lands, tenements and hereditaments (describing them), subject to the order, control and disposition of the said Court of Exchequer.

The 53d section enacted, that if the Company should not, within the space of three years after the passing of the act, agree for, or cause to be valued and paid for, in manner directed by the act, all the lands which they should think necessary for the purposes of the act, then the powers thereby given to them for such purposes only should cease, determine and be utterly void, except with the consent of the owners and occupiers thereof respectively.

money into the bank. If they take the property with such a title as *Collier* can give them, and should afterward be desirous of reselling it, they cannot make a good title, and if they wish to keep it, their right to the possession of it may be called in question by any one who has a better claim to it than *Collier*.

Platt, contrà. When the Company had once given notice that they intended to purchase this property, they became bound to do so; *Rex* v. *Hungerford Market Company* (*a*). The various clauses in the act point out the manner in which the purchase is to be completed under different circumstances of the title, but it must be completed in one way or another. If the Company have allowed the time to expire, within which they might have got a good title under the special provisions of their act, they must now take such a title as they can obtain.

The letter from *Collier's* solicitor states that he cannot give such proofs of the title as were required by the Company, and this is sufficient to bring the case within the 77th section.

The COURT (*b*).—The prosecutor has not shewn with sufficient distinctness that he was not able to deduce a good title, and therefore under these circumstances he is not entitled to have the money paid either to himself or into the bank; and the rule must therefore be discharged.

Rule discharged (*c*).

(*a*) 4 B. & Ad. 327; *S. C.* 1 N. & M. 112.

(*b*) Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*c*) On a subsequent day in this term a fresh rule for a mandamus to the Company was obtained, and afterwards (Hil. T. 1839) made absolute on an affidavit of *Collier* that he was unable to make a good title.

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Friday, Nov. 23rd.

The QUEEN *v.* The Mayor of HARWICH.

The Court will not grant a mandamus, under 1 *Vict.* c. 78, s. 24, to reinstate a person whose name has been expunged by the mayor and assessors from the burgess list, unless he proves his title, although his name may have been expunged upon an invalid notice of objection.

Quære, whether the following subscription to a notice of objection, "*Edgar Alexander*, King's Quay Street," contain a sufficient description (within 5 & 6 *Will.* 4, c. 76, s. 17,) of the objector's place of abode and of the property for which he is rated?

WORDSWORTH, on a former day in this term, obtained a rule nisi for a mandamus, calling upon the Mayor of Harwich to insert the name of *William Middleton* upon the burgess roll of that borough.

The affidavit on which the rule was obtained stated, that the overseers of the parish of Dovercourt, in the borough of Harwich, inserted the name of *Middleton* in the list of burgesses of the borough for the present year, and that he was afterwards served with a notice of objection to his name remaining in the list, which notice was subscribed thus: "*Edgar Alexander*, King's Quay Street, Harwich." On the 12th October last, at the revision of the burgess lists, proof was required of service of due notice of objection, whereupon the town clerk produced a notice subscribed as above. It was objected, that neither the notice served on *Middleton* nor the one then produced was in the form prescribed by 5 & 6 *Will.* 4, c. 76, s. 17, and given in Schedule D, No. 3, of that act (*a*); and that it did not appear from such notice what or where the property was for which the person, so subscribing himself and claiming to be the objector, was said to be rated in the burgess list. The objection, however, was gone into, the name of *Middleton* expunged from the list, and his vote at the election of councillors on the 1st November following was tendered and rejected.

(*a*) The following is the form given in the Schedule:—

"To the town clerk of the borough of ———, [*or*, "to the person objected to," *as the case may be*].

"I hereby give you notice, that I object to the name of *Thomas Bates*, of Brook's Farm, in the parish of ———, [*describe the person objected to as described in the burgess list*,] being retained on the burgess list of the borough of ——.

"Dated the ——— day of ———, in the year ———.

"(Signed) *John Ashton* of ———. [*Here state the place of abode and property for which he is said to be rated in the burgess list.*]"

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Thesiger now shewed cause. The Court will not review the decision of the mayor and assessors, who have acted in a judicial capacity, and determined that the place of the objector's abode and the property for which he was rated were described sufficiently in his notice. The notice itself would shew that he resided in a house in King's Quay Street, according to the analogies of notice of action against magistrates, and of the description of the attorney's residence, under the Uniformity of Process Act, 2 *Will.* 4, c. 39, s. 12, on which latter point there are several authorities cited in *Tadman* v. *Wood*(*a*); and the rate-book would shew that the objector was rated for the same house. The 24th section of 1 *Vict.* c. 78, may be relied on in support of the rule. That section enacts, "that it shall be lawful for any person, whose claim shall have been rejected or name expunged on the revision of the burgess roll of any of the said boroughs, to apply, before the end of the term then next following, to the Court of King's Bench for a mandamus to the mayor for the time being of that borough, to insert his name upon the burgess roll, and thereupon for the Court to inquire into the title of the applicant to be so inrolled." This will not avail the present applicant, as he has not even attempted in his affidavit to make out his title.

Wordsworth, contrà. By the 17th section of the 5 & 6 *Will.* 4, c. 76, notice of objection is to be given in a particular form, and by the 18th section it is enacted, that the mayor "shall retain on the said list (the burgess list) the names of all persons to whom no objection shall have been duly made." No objection has been duly made in this case, so that the mayor had no jurisdiction to expunge the name of the applicant, or to entertain any question respecting it. As to the sufficiency of the applicant's description, the cases under the Annuity Act, 53 *Geo.* 3, c. 141, may be

(*a*) 4 A. & E. 1011.

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referred to, which are observed upon by *Follett*, arguendo, in the *Bedford* case (*a*). The notice itself should give the information required, without the assistance of the rate book. If the description of the objector's place of abode is sufficient, it does not follow that he was rated for that same place, he may have merely lodged there. [Lord *Denman* C. J. How do you answer the objection that you have not shewn your title?] The very first step in attacking the applicant's title failed, and the Court will not seek for any thing further: as the objection is bad, the title must be taken to be good.

Lord DENMAN C. J.—This application is not to be referred to 5 & 6 *Will.* 4, c. 76, s. 18, according to which the name of a person once on the burgess list must be retained, unless notice of objection has been duly given, but to the 1 *Vict.* c. 78, s. 24, which empowers a person, whose name has been expunged from such list, to apply to this Court for a mandamus to the mayor to restore it. This clause authorises us to inquire into the applicant's title, of which, in this case, no evidence whatever has been given. It is not imperative upon us in a case like this to reinstate a name on the list, simply because the objection to it is bad. If the legislature meant that we should be bound to do so, they might easily have said so, but they have not, and there may have been very good reasons for the omission: for a friendly objector might purposely make a bad objection, to prevent any bonâ fide objection from other quarters, and thus on the defeat of his bad objection, ipso facto, a bad vote might be established. We are called upon to say that the mayor and assessors have exercised their discretion improperly, but we may as fairly give credit to them for properly expunging the applicant's name, as to the overseers for properly inserting it. We ought to require proof of title on these applications, and no proof has been offered.

(*a*) Perry and Knapp's Election Cases, 119.

PATTESON J.—The legislature seems to have intended that we should be allowed to reinstate the name of a burgess, notwithstanding any thing that may have occurred elsewhere, but only on the condition that he should satisfy us as to his title.

WILLIAMS J.—We ought to inquire into the title of a party applying for a mandamus under the 24th section of the act of *Victoria*, if we do not, the words as to title might as well be out of the section.

COLERIDGE J.—It has not been denied that before the act of *Victoria* the decision of the mayor and assessors on a claim to be on the burgess list was conclusive. In this act the legislature has given us the power to interfere to a certain extent, and the question is to what extent. This Court can only act in the execution of the statutable power, as it were. It appears to me that by the terms of the power we are bound to inquire into the title of the applicant before reinstating him. It is said that, if the objection to it is bad, we ought to assume the title to be good. But if credit is to be given to the overseers, on the one hand, for inserting the name properly, why should we not give credit to the mayor and assessors, on the other hand, that they decided on the merits? But I wish to put both these suppositions on one side. A party gets a new title altogether from this Court, and he should adduce substantial reasons for our interposition.

Thesiger applied for costs. But—

Per CURIAM. Rule discharged without costs (*a*).

(*a*) Several other rules against the same defendant, for the insertion on the burgess list of other names, were disposed of by the decision in this case.

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Wednesday, Nov. 21st.

RAIKES and another *v.* TODD.

1. In the following guarantee, "I hereby undertake to secure to you the payment of any sums of money you have advanced or may hereafter advance to Messrs. *H. D.* & Co. on their account with you," the consideration for guaranteeing past advances does not sufficiently appear, so as to satisfy the Statute of Frauds.

2. In assumpsit on a guarantee, the defendant may shew, under the general issue, that the consideration alleged in the declaration is not the actual consideration to be inferred from the instrument.

3. Where a debt having been partly guaranteed, the debtor becomes bankrupt, and the creditor proves for a larger amount than that covered by the guarantee, the dividends must be applied, in ease of the guarantor, rateably to the whole debt proved.

ASSUMPSIT on a guarantee. The first count of the declaration stated, that the plaintiffs had been and still were bankers, and as such bankers had opened an account with one *Henry Davenport*, using the name, style, and firm of "Messrs. *Henry Davenport* and Company," commencing on the 1st of November, 1831, and had advanced to *H. D.* on his account the sum of 1600*l.*, which sum, on the 19th October, 1832, was owing by *H. D.* to the plaintiffs, whereof the defendant had notice; and thereupon afterwards, to wit, on the day and year last aforesaid, in consideration of the premises, and in consideration that the plaintiffs, at the request of the defendant, would continue from time to time to advance further sums of money to *H. D.* on his account, commencing with them as aforesaid, the defendant undertook to *secure* to the plaintiffs the payment of any sums of money they might then have advanced or might thereafter advance to *H. D.* on his account with them, commencing as aforesaid, not exceeding 2000*l.* Averment, that plaintiffs, confiding &c., on the 19th October, 1832, and on divers other days between that day and the 1st May, 1833, did further from time to time advance to *H. D.* on his account, commencing with them as aforesaid, the sum of 1300*l.*: that *H. D.*, although requested, had not paid any part of the said sums of 1600*l.* and 1300*l.*: yet that defendant, not regarding &c., had not secured or paid to plaintiffs the sum of 2000*l.*, parcel of the said sums, but that the said sum of 2000*l.* was still owing.

Pleas: 1. As to so much of the first count of the declaration as alleged that defendant undertook to secure to plaintiffs the payment of any sums of money they might *then have advanced*, non assumpsit. 2. As to the residue of the said first count, payment into Court of 1146*l.* 7*s.* 6*d.*, and that plaintiffs had not sustained greater damages. 3. Set-off as to all except the said sum of 1146*l.* 7*s.* 6*d.*

The replication joined issue on the first plea, accepted the 1146*l.* 7*s.* 6*d.* in the second plea, in satisfaction of the cause of action in the plea mentioned, and traversed the third plea of set-off; on which issue was joined.

At the trial before *Alderson* B. at the Yorkshire Spring assizes, 1837, it appeared that the defendant had given the plaintiffs the following guarantee:—

"Messrs. *Raikes*. October 19, 1832.

"Gentlemen,—I hereby undertake to secure to you the payment of any sums of money you have advanced or may hereafter advance to Messrs. *Henry Davenport* & Co. on their account with you, commencing the 1st November, 1831, not exceeding 2000*l*. *John Todd.*"

It appeared also that *Davenport*, in the name of *Henry Davenport* & Co., opened an account with the plaintiffs on the 1st November, 1831. In October, 1832, at the time the guarantee was given, he owed the plaintiffs a balance of 1651*l*. 16*s*. 7*d*., and a sum of 1305*l*. 1*s*. 3*d*. had been advanced to him subsequently to the guarantee. The account was continued till March, 1833, shortly after which time *Davenport* became a bankrupt. The whole amount then due was 2426*l*. 17*s*. 11*d*., some payments having been made by *Davenport* applicable to the old balance. The plaintiffs proved their balance of 2426*l*. 17*s*. 11*d*. under *Davenport*'s bankruptcy, and received two dividends in respect thereof. The sum paid into Court was therefore ascertained as follows:—

	£.	s.	d.
Advances subsequent to guarantee . . .	1305	1	3
Dividends received in respect thereof . .	158	13	9
Amount paid into Court . . .	1146	7	6

It was objected, on behalf of the defendant, that the guarantee, so far as it applied to by-gone advances, was invalid, as being without any consideration on the face of the instrument; and a question was also raised, whether the plaintiffs were bound to give credit for the dividends received under the bankruptcy of *Davenport*, or whether they were not entitled to place the dividends, as well as

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the payments made by *Davenport*, to the credit of his general account, in which case the defendant would be liable to the extent of 2000*l.* on his guarantee, if it were good as to past advances, notwithstanding the receipt of such dividends by the plaintiffs. The learned Judge was of opinion that the word "secure" in the guarantee implied forbearance to sue on the part of the plaintiffs; so that it contained a good consideration for the guarantee as to past advances, and that the defendant could not avail himself of the amount paid as dividends under *Davenport's* bankruptcy, but must be liable to the full extent of 2000*l.*, the amount of the guarantee, minus the 1146*l.* 7*s.* 6*d.* paid into Court. Verdict accordingly for 853*l.* 12*s.* 6*d.*, with leave to the defendant to move to enter a verdict for himself, or to reduce the damages, as the Court should think proper.

Alexander, in the following Easter term, having obtained a rule nisi,

First point: Consideration for guarantee as to past advances does not sufficiently appear.

Cresswell and *Wharton* now shewed cause. The validity of this guarantee is disputed on the ground that it discloses no consideration for securing the past advances. It is sufficient, however, in instruments of this kind, if the consideration, though it does not appear on the face of them, can be reasonably intended; and they are to be taken as strongly against the party making them as the sense will allow; *Mason* v. *Pritchard* (*a*). The understanding between the parties to this guarantee obviously was that the account with *Davenport* should be kept open, and that future advances should be made; which constitute an ample consideration for the guarantee as to past advances also. In *Russell* v. *Moseley* (*b*) it was held that the consideration sufficiently appeared on the following instrument, which is very like the present:—"I hereby guarantee the present account of Miss *Harriet Moseley*, due to *R. T. Shortridge* & Co. South Shields, of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th September

(*a*) 12 East, 227. (*b*) 3 B. & Bing. 211.

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next." In *Jenkins* v. *Reynolds* (*a*), the following guarantee, "To the amount of 100*l.* be pleased to consider me security on Mr. *James Cowing* & Co.'s account," was held insufficient; but it might have related altogether to a past account of 100*l.*, so that no consideration appeared. [*Patteson* J. The word "account" was not taken to refer to the keeping an account open for the party, but merely to mean "on his behalf."] In *Wood* v. *Benson* (*b*) the guarantee was in the following terms:—"I the undersigned do hereby engage to pay the directors of the Manchester Gas Works, or their collector, for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law, Mr. *Neville;* and I do also engage to pay for all arrears which may be now due." In that case, it is true, so much of the guarantee as related to the payment of arrears was not sustained. But the engagement there was manifestly divisible into two branches: the sense of the first member of the instrument, applicable to past supplies, was complete in itself, and terminated by a semicolon; the promise was made first as to the future supplies, which formed the consideration, and then the promise as to past supplies stood by itself denuded of any consideration whatever. The defendant's engagement cannot be severed into two; there can be no doubt that he intended to secure both past and future advances; and in the words of *Tindal* C. J., speaking of guarantees, in *Newbury* v. *Armstrong* (*c*), "we ought not to be too strict in the construction of these instruments; for if every agreement entered into by a tradesman be so minutely criticised, it will be necessary to resort to an attorney in the most common intercourse of life."

Second point: The dividends under debtor's bankruptcy are not to be applied in ease of the guarantor.

As to the right of the defendant to apply, in reduction of his liability, the amount of dividends received under *Davenport's* bankruptcy, it is clear that the object of his guarantee was to secure them to the extent of 2000*l.*, the

(*a*) 3 B. & Bing. 14.
(*b*) 2 C. & J. 94.
(*c*) 6 Bing. 201.

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sum fixed in the guarantee, from loss by their account with *Davenport*. Now their loss, after receipt of the dividends, will exceed 2000*l*., and such dividends cannot in principle differ from any past payment by *Davenport*, which of course would go into the general account, without narrowing the liability of the defendant.

Third point: Defence should have been specially pleaded.

Lastly, the defendant cannot, under the general issue, set up the defence that there was no consideration for his undertaking, *Passenger* v. *Brookes* (*a*), or that there was no memorandum under the Statute of Frauds.

First point.

Alexander and *Tomlinson*, contrà. In *Russell* v. *Moseley* (*b*) the attention of the Court was not sufficiently drawn to the distinction in the consideration, as it applied to the by-gone and the future debt; and it appears from another report of the case (*c*), that the verdict, by consent of the plaintiff's counsel, was ultimately entered for those supplies only which had been furnished after the date of the guarantee. That case, therefore, according to this latter report, is in favour of the defendant, and agrees with *Wood* v. *Benson* (*d*), which is precisely in point. It is not contended that the consideration must be co-extensive with the promise, or that it must appear in express terms on the face of the instrument. The true rule is laid down by *Tindal* C. J. in *Hawes* v. *Armstrong* (*e*). He says that the consideration need not appear on the instrument in express terms; and then adds, "not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute: but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the pro-

(*a*) 1 Bing. N. C. 587.
(*b*) 3 B. & Bing. 211.
(*c*) 6 B. Moore, 521.
(*d*) 2 C. & J. 94.
(*e*) 1 Bing. N. C. 761.

mise." So also *Patteson* J., in delivering the judgment of the Court in *James* v. *Williams* (*a*), and referring to *Cole* v. *Dyer* (*b*), observes, "That case shews that you must be able to fix upon the consideration on the face of the instrument, not as a matter of conjecture, but as matter of undoubted certainty." In *Wain* v. *Warlters* (*c*) it might have been implied that forbearance was the consideration, but the Court thought it not sufficiently evident. In *Stadt* v. *Lill* (*d*) the guarantee applied only to a future delivery of goods, and such delivery was implied by the Court to be the consideration. So here, if the guarantee had been limited to future advances, it might have been a fair inference that they formed the consideration for the defendant's promise. But with respect to past advances, can it be said, according to the test furnished by *Tindal* C. J., and *Patteson* J., that the consideration for the guarantee may be inferred without conjecture? The consideration, as suggested by *Alderson* B. at the trial, might have been forbearance of the past debt. Again, it might have been the making of future advances, as alleged in the declaration, and contended for on the present argument. Or, lastly, it might have been, and probably was, compounded of *both* ingredients, forbearance and future credit. According to the construction now set up on behalf of the plaintiff, the future advance of a single penny would have rendered the defendant liable for the whole of the past debt of 1600*l.*; but, as the object of the guarantee was to enable the defendant to carry on his business, forbearance also of the past debt was most essential to him. The amount of future advances is not stipulated, and the great improbability, therefore, that, in consideration of a future advance, however trifling, the defendant would guarantee the past debt of 1600*l.*, must exclude the inference of such a bargain, where it is not expressed. As the real consideration, then, for securing the past debt is open to so much doubt, it

(*a*) 5 B. & Ad. 1109.
(*b*) 1 C. & J. 461.
(*c*) 5 East, 10.
(*d*) 9 East, 348.

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cannot be said that there is a sufficient memorandum of the agreement, so as to satisfy the Statute of Frauds.

Second point.

The defendant had a right to deduct the dividends from the amount claimed under the guarantee. By the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 52, the surety paying his creditor the amount due, may either take the benefit of the creditor's proof *pro tanto*, or may himself prove the amount and receive the dividends. The dividends should have been applied rateably to the whole debt; *Bardwell* v. *Lydall* (*a*). [Lord *Denman* C. J. We are entirely with you on that point.]

Third point.

Then it is said that the defendant ought to have pleaded specially that the guarantee was insufficient, under the Statute of Frauds. But that was not necessary: the new rules say that non assumpsit shall operate as a denial in fact of the express contract or promise alleged. If the written contract state one consideration, and the declaration another, defendant could not plead the variance, as that would be an argumentative denial. The defendant has not, as in *Passenger* v. *Brookes* (*b*), sought to avoid, by collateral matter, the consideration declared on, but he denies it altogether. This distinction is pointed out by *Parke* B. in *Bennion* v. *Davison* (*c*). [Lord *Denman* C. J. We think if you disprove the consideration, you disprove the contract.]

Lord DENMAN C. J.—The question is, whether the plaintiff has made out the contract alleged in his declaration. The declaration sets out the guarantee given by the defendant, and states the consideration to be this:—that the plaintiffs, at the request of the defendant, would continue from time to time to advance further sums of money to *Davenport*. There is certainly no necessity that the consideration should be co-extensive with the promise; but the real consideration, whatever it was, must be set out on

(*a*) 7 Bing. 489. See also *Paley* v. *Field*, 2 Ves. jun. 435.

(*b*) 1 Bing. N. C. 587. See the report in 1 Scott, 560.

(*c*) 3 M. & W. 179.

the record. I entirely agree in the rule of construction recently laid down by *Tindal* C. J. and my brother *Patteson;* and on reading this guarantee, with reference to that rule, I must confess myself unable to say what it was that induced the defendant to guarantee payment of the past advances. I should form a conjecture that both forbearance to sue for the past debt, and the making of further advances, constituted the consideration. That, however, is conjecture only, and the declaration alleges a different consideration, namely, the further advances only. I think, therefore, the real consideration is not set out in the declaration, and the great uncertainty in which it is left entitles the defendant to have the rule made absolute.

PATTESON J.—I have had some difficulty in coming to a conclusion, but on the whole I must say that I cannot, from the perusal of this guarantee, ascertain the defendant's motive for securing the past advances. The mention of future advances enables me to infer reasonably that the making of such advances formed the consideration for the defendant's promise to secure them; but I cannot infer that they in like manner formed the consideration for his promise as to the past advances. The consideration, therefore, with respect to them is left to conjecture. There does not, on the face of this instrument, appear to have been any engagement by the plaintiffs to forbear suing for them, and if such an engagement did appear ever so distinctly, it is not alleged in the record, and would, therefore, be just as fatal as the present uncertainty.

WILLIAMS J.—The question is, whether the real consideration for the defendant's promise can, without conjecture, be collected from a perusal of this guarantee. The learned judge who tried the cause thought the word "secure" implied forbearance to sue for the past advances, and that this was the consideration which had induced the defendant to guarantee them. Other considerations for

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this part of the guarantee have been suggested to-day, and it is impossible to say that the actual consideration is not left in very great doubt.

COLERIDGE J.—Mr. *Tomlinson*, in his able argument, laid down the correct rule of construction applicable to guarantees, that the consideration must either appear on the face of them, or by necessary inference from them; for unless this is the case parol evidence is not excluded. The terms of this instrument do not lead to any clear inference that the future advances were, as the declaration alleges, the consideration for guaranteeing the by-gone advances. The learned judge at the trial inferred from the word "secure," that forbearance was the consideration. I think so too. If such was the consideration it is untruly stated; and if it was not, then it is quite uncertain.

Rule absolute to enter a verdict for the defendant.

Saturday, Nov. 24th.

The Court refused to grant a certiorari to bring up a coroner's inquisition to be quashed, which purported to be taken before A. R. coroner of H., but which in reality was taken before the coroner's clerk, and which was in other respects invalid

Ex parte DAWS.

CLARKSON moved for a writ of certiorari to be directed to the coroner for the Rape of Hastings, in the county of Sussex, to bring up the inquisition taken on the 3rd of April, 1838, at Mountfield, in the county of Sussex, on view of the body of *James Laurence Daws*.

He made this motion on affidavits of the father of the deceased and of others, by which it appeared that the inquisition in question was held before the clerk of the coroner for the Rape of Hastings, who had since died; that the jury consisted of thirteen, and that the person who held the inquest, on summing up the evidence, asked each of the jurors separately what was the verdict, when seven of the jury said, they were of opinion the deceased died in a fit, and the other six were of opinion he died from the effects

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of liquor. The coroner then told them that, as there was a difference of opinion between them, the majority must bind the minority, and they must bring in a verdict that the deceased died of "Apoplexy or other visitation of God." The jury accordingly did so. Some of the jury could not write, and none of them signed their names or set their marks to the inquisition.

The inquisition purported to be taken "before *Charles Arnold*, coroner for the said Rape."

Clarkson stated, that he moved on the part of the father of the deceased, in order to have a fresh inquisition. [Lord *Denman* C. J. Is it clear that we should quash every inquisition we might find to be bad? According to the statement you make, the inquisition is bad.] On the face of it, it appears to be taken by the coroner. [Lord *Denman* C. J. Suppose any one should profess himself to be the coroner for Middlesex, and take an inquest in that character, would it not be a nullity?] It is submitted that, if such an inquisition were produced from the coroner's office, it ought to be brought up here to be quashed, before a *melius inquirendum* can be issued. It is said, (2 *Hawk.* P. C. p. 80, ed. by *Curwood*,) "none can take an inquest on view in any case but the coroner." In the same book (p. 89) it is laid down that, if the inquisition is quashed for point of form only, the coroner ought to take a new inquisition as if none had been taken; but if it appear that the coroner has been guilty of misconduct, then a *melius inquirendum* shall be awarded. [*Patteson* J. That is where the inquisition has been taken by the coroner; here it has been taken by a person wholly unauthorized.]

Lord DENMAN C. J.—It appears to me we should be doing a very unnecessary act, if we were to grant the certiorari, as it would only be an encouragement to any captious objections that might be made from time to time. If

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the deceased came to his death by any improper means, there is nothing to prevent an indictment being preferred.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Rule refused.

Saturday, Nov. 24th.

The QUEEN *v.* The Justices of ST. ALBAN'S.

The Parochial Assessment Act, (6 & 7 *Will.* 4, c. 96, s. 6,) enacts, that the decision of the special petty sessions shall be binding, unless notice of appeal be given within 14 days after the decision, and a recognizance be entered into *within five days* of such notice before some justice of the peace. Where recognizances were duly entered into within the five days, and a minute of the recognizances was entered in the minute book by the clerk of the peace, but the recognizance itself was not then drawn up and signed by a justice of the peace; the Court held that the words of the statute were satisfied, and therefore where, on appeal to the quarter sessions, the recognizances were produced without the signature of any justice, and it appeared that by inadvertence the record had been sent by the clerk of the petty sessions to the clerk of the quarter sessions without such signature, and the sessions quashed the appeal on the ground of the recognizance being invalid, this Court issued a mandamus to the quarter sessions to enter continuances, and hear the appeal.

PLATT, on a former day in this term, had obtained a rule nisi for a mandamus to the defendants to enter continuances, and hear an appeal against an order of petty sessions, amending a rate made upon the Hon. and Rev. *William Capel.*

By the affidavits on which the rule was obtained, it appeared that Mr. *Capel* had appealed against a rate made upon him by the parish of Watford, to the petty sessions held on the 24th of July last, who allowed the appeal and reduced the rate. The parish of Watford thereupon gave notice of appeal to the quarter sessions, and they entered into a recognizance before three justices at the petty sessions held at Watford, to try the appeal on the 7th August last. Entry of the recognizance was made in the minute book by the deputy clerk of the peace, and was signed by one of the justices present; and by the practice of the Watford petty sessions in taking recognizances, minutes of the proceedings are taken at the time, from which the records are afterwards made up, and are then signed by one of the justices. The record was made up, but was not sent to any justice to be signed.

The affidavits in answer stated, that by inadvertence the record had been sent by the clerk of the petty sessions to the clerk of the quarter sessions, without the signature of the justices having been obtained.

On the hearing of the appeal at the last Michaelmas quarter sessions for St. Alban's, when the appeal was called on for trial, the counsel for the respondent called for the recognizances to be produced, and on their appearing to be without signature, objected that they were invalid. The appellants offered to prove, by parol evidence, that the recognizances had been properly entered into, and to produce the minute signed by the justices at the time; it was also proposed to procure the signature of one of the justices who took the recognizance, who was then present in Court; but the sessions decided, that a recognizance made up as aforesaid could not be made up and perfected soon enough so as to satisfy the statute, which, in their opinion, required it to be perfected within five days after the giving of the notice of appeal, and they quashed the appeal.

Wordsworth now shewed cause. Under s. 6 of the Parochial Assessment Act, 6 & 7 *Will.* 4, c. 96 (*a*), it was imperative to prove that the recognizance had been duly entered into five days after giving notice of appeal. In the present

(*a*) The Parochial Assessment Act, 6 & 7 *Will.* 4, c. 96, s. 6, enacts "that the justices acting in and for every petty sessions shall, four times at least in every year, hold a special sessions for hearing appeals against the rates of the several parishes within their respective divisions,"—"and at such special sessions, the justices there present shall hear and determine all objections to any such rate &c., which decision shall *be binding and conclusive on the parties*, unless the person or persons impugning such decision shall, within fourteen days after the same shall have been made, cause notice to be given in writing of his, her, or their intention of appealing against such decision, and of the matter or cause of such appeal,"—"and within five days after giving such notice shall enter into a recognizance before some justice of the peace, with sufficient securities, conditioned to try such appeal at the then next general sessions or quarter sessions of the peace, which shall first happen, and to abide the order of and pay such costs as shall be awarded by the justices at quarter sessions."

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case, no recognizance had been entered into, but only a minute made on a piece of paper. It is clear that recognizances cannot be proved by such evidence, as was held in *Rex* v. *Smith* (*a*), where an indictment alleged a record of quarter sessions, and it was held, that it could not be proved by the production of the minute book of the clerk of the peace, although no record had been in fact drawn up (*b*). It was also said, that the signature of the justices might be affixed to the recognizance at the hearing of the appeal, but that clearly does not satisfy the words of the statute.

Platt, contrà, was not called upon by the Court.

Lord DENMAN C. J.—I think this rule must be absolute. The objection is, that the recognizance was not entered into five days after giving notice of appeal. But the petty sessions decided the case on the 24th of July, notice of appeal was given within fourteen days, and within five days of the notice the recognizance was entered into. There is no objection, therefore, on that ground.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

(*a*) 8 B. & C. 341.

(*b*) See *The Queen* v. *Yeaveley*, *ante*, p. 60.

Saturday, Nov. 24th, and Monday, Nov. 26th.

The QUEEN *v.* RICKETTS.

Where it appeared on the face of a writ of capias cum proclamatione that a whole term had intervened between its teste and the term in which the writ de contumace capiendo was returnable, the Court quashed the writ of capias, as being a discontinuance on the face of it.

SIR *F. POLLOCK*, on the first day of this term, had obtained a rule calling upon the prosecutors to shew cause why two writs of *capias cum proclamatione*, issued in this case, should not be quashed, with costs. The affidavits on which the rule was obtained stated the following facts. In the year 1833 two decrees, one of the Arches Court of Canterbury, and another of the High Court of Delegates,

were pronounced against the defendant in a suit for the subtraction of church-rates. In Michaelmas term, 1837, two writs *de contumace capiendo* against the defendant, directed to the sheriff of Herefordshire, were issued upon significavits from the Courts of Arches and Delegates respectively, bearing teste on the 25th of November in that year, and returnable on the 11th of January last, the first day of Hilary term: to which writs the sheriff made the following return: "The within-named *Thomas Bourke Ricketts is not found* in my bailiwick." Writs of *capias cum proclamatione*, founded upon the above return, were issued against the defendant, tested the 24th of May last, the first day of Trinity term, and returnable on the 2d of November, the first day of the following Michaelmas term. The form of the Delegates' writ, from which that of the Court of Arches differed only in the style of the Court, after reciting the significavit and writ *de contumace capiendo, as being returnable on the 11th of January*, and that the sheriff, in obedience to the said writ, had returned that the defendant "*was not found*" in his bailiwick, proceeded thus: "therefore, according to the form of the statutes in such case made and provided, we command you that you do not forbear by reason of any liberty in your bailiwick, *but that you take the said T. B. Ricketts if he shall be found in your bailiwick, and him safely keep*, so that he may make satisfaction for the said contempt. *And if the said T. B. R. shall not be found in your bailiwick*, that *then* you cause open proclamation to be made, ten days at least before the return of this writ;" concluding in the language of the 4th section of the 5 *Eliz.* c. 23, by requiring the sheriff to call upon the defendant, within six days after such proclamation, to yield himself up to prison, according to the effect of the writ, under penalty of 10*l.* The affidavits then stated that the writ *de contumace capiendo* was not lodged with the sheriff at any time between the teste and return, and not till long after he had quitted office, viz, on the 13th of June, on which day he made the return of *non est inven-*

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tus. At the foot of which return was a memorandum, "Received June 13, 1838." And that the writ of *capias cum proclamatione*, although tested on the 24th of May, was not issued from the Crown Office till the 21st of June. It was also stated that Mr. *Ricketts* was to have been found at his dwelling-house in the county of Hereford on several days between the teste and return of the writ *de contumace capiendo.*

Sir *F. Pollock* objected on these facts, 1. That, as the 53 *Geo.* 3, c. 127, directs that all proceedings in respect to a writ *de contumace capiendo* shall be governed by the 5 *Eliz.* c. 23, which applies to the old writ *de excommunicato capiendo*, and as the writ *de contumace capiendo* had not in this instance been delivered to the sheriff till after it was returnable, nor till after the sheriff was out of office, the writ was a spent writ, and the writ of *capias cum proclamatione* had issued irregularly, as the 5 *Eliz.* c. 23, s. 5 (*a*), makes the sheriff's return to the former writ a

(*a*) The 5 *Eliz.* ch. 23, sect. 2, enacts, "that every writ of *excommunicato capiendo* that shall be granted and awarded out of the High Court of Chancery against any person or persons within the realm of England, shall be made in the time of term, and returnable in the King's Bench in the term next after the teste of the same writ; and after the same writ shall be so made and sealed, that then the said writ shall be forthwith brought into the said Court of King's Bench, and there, in the presence of the justices, shall be opened and delivered of record to the sheriff or other officer to whom the serving and execution thereof shall pertain."

Sect. 3 enacts, "that the sheriff to whom such writ shall be directed shall not be compelled to bring the body of such person as shall be named in the said writ into the said Court at the day of the return, but shall only return the same writ, with a declaration briefly how he had served and executed the same, to the intent that thereupon the said justices may then further therein proceed, according to the tenor and effect of this present act."

Sects. 4 and 5 enacted, "that if the sheriff return that the person named in the said writ 'cannot be found within his bailiwick,' then upon every such return a writ of *capias cum proclamatione* is to be issued, for the party to deliver himself up to prison, 'under pain of forfeiture of 10*l.*'"

Subsequent sections direct, in case of the party's default, the award of a second capias, and a penalty of 20*l.*; and in like manner the awarding of capias infinitely, and a penalty of 20*l.* for every subsequent default.

ondition precedent to the issue of the second. 2. The writ of *contumace capiendo* being made returnable on the 11th of January, there was no continuance entered between that day and the 24th of May. 3. The sheriff's return of "*non est inventus*" is improper, and ought to have been "*inveniri non potest*," as the words of the 5 *Eliz.* c. 23, s. 4, are, if the sheriff shall return that the party "cannot be found." 4. Mr. *Ricketts* was to have been found at his own dwelling-house. 5. That the writ of *capias cum proclamatione* had been issued in the vacation, which was irregular: and 6. The writ deviated from the form prescribed by the stat. of *Eliz.*, which directs a proclamation to be made at all events.

Sir *W. W. Follett* and *Stammers* now shewed cause. 1 & 2. The writ *de contumace capiendo* was properly issued in Michaelmas term, and made returnable in the ensuing Hilary term, in compliance with the 5 *Eliz.* c. 23, s. 2. It is true that it was not delivered to the sheriff till after it was returnable; but it was not necessary that it should have been. The only object of issuing it was to found ulterior process upon it. An ex-sheriff may return a writ after the expiration of his office. The date of the actual delivery is no objection to the subsequent process issued upon it. A question of this kind was much discussed in *Taylor* v. *Gregory* (*a*). [*Patteson* J. The writ of *capias cum proclamatione* recites that the writ *de contumace capiendo* was issued, returnable on the 11th of January last, and that the sheriff had returned upon it *non est inventus*, and therefore the writ of *capias cum proclamatione* was issued. It appears now that the former writ had not been issued before the teste of the second writ.] It is immaterial whether in fact it had been issued prior to its return; for by s. 4 of 5 *Eliz.* the sheriff is not required to take the body upon the writ. Continuances may be entered as in other cases, previous to the new rules, by entry on the roll of "*vicecomes non misit*

(*a*) 2 B. & Ad. 257.

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breve," down to the issue of the *capias cum proclamatione* on the 24th of June. This being a criminal process, is not affected by the new rules. [*Patteson* J. That was by a fiction of law, not at all to be encouraged.] In *Taylor* v. *Gregory* (*a*) this very objection was made. The Court ordered continuances to be entered, and it was objected that the writs had never been delivered to the sheriff; but it was said that it was of no consequence. Again, the 5 *Eliz.* c. 23, s. 2, directs the writ *de excommunicato capiendo* (for which the writ *de contumace capiendo* is substituted by the 53 *Geo.* 3, c. 127,) to be delivered *of record* to the sheriff, and as the writ of *capias cum proclamatione* recites the former writ, and that it was duly delivered to the sheriff and returned by him, that is sufficient, for there can be no averment against a record; *Floyd* v. *Barker* (*b*). 3. The sheriff's return of "*non est inventus*" was quite right, for the legal meaning of that is, the defendant cannot be found; *Rex* v. *Sheriff of Kent* (*c*). 4. The affidavit that Mr. *Ricketts* was to be found between the teste and return of the writ cannot be heard against the record. If the sheriff's return is false he may be proceeded against in an action, but it cannot be averred against; *Avril* v. *Sheriff of Warwick* (*d*), *Goubot* v. *De Crouy* (*e*), *Vin. Abr.* Return, O; *Com. Dig.* Retorn (G). Before the late rules it was a most common practice to return *non est inventus* to writs, in order to save the Statute of Limitations, although the party was well known to be within the bailiwick. 5. The last point is, that the *capias cum proclamatione* was issued irregularly in vacation. But there is nothing in either of the acts to confine its issue to term time, and the constant practice at the Crown Office has been to issue such writs in vacation. 6. As to the proclamation, the meaning of the statute is, that it shall be made only when the defendant is not in the bailiwick; if he be in the bailiwick the sheriff must take him.

(*a*) 2 B. & Ad. 257.
(*b*) 12 Rep. 24.
(*c*) 1 Murphy & Hurl. 13.
(*d*) 3 N. & M. 871.
(*e*) 1 C. & M. 772.

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Sir *F. Pollock* and *J. W. Smith*, contrà. This is a statutable proceeding, and the course marked out by the statute must be strictly observed. It is also a highly penal process, and to be construed strictly. But the plaintiffs have deviated from the direction of the statute, both in the form of the writ and in the course adopted in issuing it. The writ is bad in form, for the statute of *Eliz.* expressly directs that proclamation shall be made *at all events;* whereas this writ only directs it to be made in case of the defendant not being found within the bailiwick. But the defendant may be in the bailiwick, although the sheriff cannot find him; and the meaning of the statute was, that in such case he should have warning, by the proclamation, of the penalty to which he would be liable if he did not come and surrender. And this is obvious from the 14th section, which directs, that when the defendant's name is with a *super* of some other bailiwick, the proclamation is to be made there, because that is the most likely place for him to be. So that the case which the plaintiff contends to be the only one in which proclamation need be made *in* the bailiwick to which the writ goes, is the very case in which the act directs that it shall be made out of the bailiwick. Besides, it never can be ascertained, till the return-day of the writ, whether the defendant will be found in the bailiwick or not; so that if the proclamation is not to be made till that is ascertained, it never can be made at all. [*Patteson* J. Has the sheriff power to take the defendant at all, if he do not surrender?] Perhaps not; perhaps the effect of the statute of *Elizabeth* is, that the sheriff is always to make proclamation, and only to take the body if it be voluntarily surrendered in pursuance of the proclamation, which would be an additional argument to shew the necessity of making the proclamation, at all events. As to the discontinuance, the writ is also plainly bad on that ground. The *contumace capiendo* is the first process: that is to be continued by a capias with a 10*l.* penalty, then by one with a 20*l.* penalty, and so on. The teste of each

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writ should be on the day, or at least in the term, of the return of the writ preceding it; *Willatt* v. *Archer* (*a*); *Com. Dig.* Pleader (V 3). Here the *contumace* is returnable in January, and the capias is not tested till May 24th. It is argued that the Court will permit proper continuances to be supplied, but that is impossible in the present case. [*Patteson* J. The return of the *contumace capiendo* here was not made, in point of fact, until just before the day of issuing the *capias.*] That is of no importance, since the discontinuance appears on the capias itself. Moreover, it is sworn and not denied, that the *contumace capiendo* was never in the sheriff's hands between its teste and its return, nor until he had left office. But the act directs "that it shall be delivered to the sheriff of record;" and an omission so to deliver it has been held fatal; *Anonymous* (*b*). Had it been so delivered, Mr. *Ricketts* might have surrendered to it, and so avoided the capias. If the *contumace* need not be put in the sheriff's hands, neither need the first *capias;* and then the defendant will be subjected to the 20*l.* penalty by a fiction.

Lord DENMAN C. J.—Without entering into any other points, I think it sufficient to say that this writ of *capias cum proclamatione* must be quashed, on the ground of discontinuance. The writ *de contumace,* it appears from the writ of *capias,* was returnable on the 11th of January, the first day of Hilary term. The whole of Easter term elapses, during which nothing is done; then on the first day of Trinity term comes the writ of *capias,* which is not connected by continuances with the prior proceedings.

PATTESON J.—I am of the same opinion. The writ *de contumace capiendo* bears teste on the 25th of November, 1837, and is made returnable on the 11th of January, the first day of Hilary term, 1838, and the writ of *capias* is not tested until the 24th of May following, being the first day

(*a*) 1 Mann. & R. 31. (*b*) Cro. Jac. 566.

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of Trinity term. If one process is to be a regular continuance of the other, and the dates are to be taken which the writ of *capias* itself furnishes, then the writ *de contumace* appears certainly to have been returned in proper time; but there is a hiatus of the whole of Easter term between its return and the issuing of the subsequent writ. If, however, the prosecutor, to obviate the objection to his proceedings, on the ground of discontinuance, repudiates the dates on the face of the writ itself, and shews *aliunde* that the prior writ was returned at a much later period, so that in point of fact it is properly connected with the subsequent writ, then all the other circumstances must be taken into consideration, and the other objections arise, that the prior writ was not returned in due time, and that it never came into the sheriff's hands until after it was spent, and he himself had gone out of office.

WILLIAMS J.—I will only add, that it appears to me that the proclamations under the statute were not intended as an idle ceremony. It does not follow of course that the sheriff would be able to take a party, although he might be in the bailiwick. The very object of the proclamations might be to bring such a party in.

COLERIDGE J. concurred.

Rule absolute.

CODRINGTON *v.* LLOYD.

Where two issues were joined, one of law and another of fact, on pleas to the same count, and the issue contained an entry of *venire ad triandum* only, and not of *quam inquirendum* also, the Court set aside the issue and notice of trial, with costs for irregularity.

HUMFREY, in Trinity term, 1837, had obtained a rule to shew cause why the issue and notice of trial in this case should not be set aside for irregularity with costs. The objection was, in substance, that although an issue in fact and an issue in law had been raised with respect to the same count, the award of the venire in the issue was not entered to assess contingent damages upon the issue in law, as well as to try the issues in fact.

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Wightman, on the last day of the same term, shewed cause(*a*), and cited *Pepper* v. *Whalley*(*b*).

Humfrey was heard in support of the rule.

Cur. adv. vult.

Lord DENMAN C. J. in this term (*c*) delivered judgment. The question in this case in substance amounts to this, whether it be necessary that the jury process should be as well to try the issue in fact as to assess damages on the issue in law, in a case where two pleas are pleaded to the same count, to one of which the plaintiff replies, and to the other demurs, so that an issue in fact and another in law arise out of the same count. It is said that a *venire tam quam* cannot be requisite, because if the jury find the issue in fact for the plaintiff, they will of course assess the damages also, which must obviously be the same as would be assessed on the issue in law; and if they find it for the defendant, the action is defeated, and no damages can be recovered. This argument is quite just in the event of the jury finding for the plaintiff, but if they should find for the defendant, it is still possible that the plea may be held bad, and that the Court may give judgment for the plaintiff notwithstanding the verdict: if they should do so, and also give judgment for the plaintiff on the demurrer, he will be entitled to damages, and a second jury must be summoned to assess them; whereas if the *venire* in the first instance had been *tam quam*, they would have been assessed by the first jury.

The practice has uniformly been to award a *venire tam quam* in similar cases, and as there is a possible state of circumstances which may lead to the necessity of summoning a second jury, if that form be not adopted, this issue is incorrect in not adopting it, and the rule to set it aside as irregular must be made absolute.

Rule absolute.

(*a*) Before Lord *Denman* C. J., *Littledale*, *Patteson* & *Williams* Js.

(*b*) 1 Har. & Wol. 480.

(*c*) Nov. 3d.

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Friday, November 23d.

Under the 1 & 2 *Vict.* c. 110, s. 7, a judge has no authority to make an order for the detention of a prisoner in custody, at the time of the passing of the act, "until he shall give bail, *or until further order.*"

BODDINGTON *v.* WOODLEY.

SIR *W. W. FOLLETT*, on a former day in this term, had obtained a rule to shew cause why an order of *Coltman* J., dated the 10th day of October last, should not be set aside, and the defendant be discharged out of custody.

It appeared by the affidavits on which the rule was obtained that the defendant had been arrested on the 5th August last, by virtue of a writ of capias ad respondendum, for 9000*l.*, and was detained in custody for the same cause on the 1st October, when the 1 & 2 *Vict.* c. 110, for abolishing arrest upon mesne process, came into operation. A summons, having been thereupon taken out for discharging the defendant, was heard by the above learned judge, on the 10th October, who then made the order in question, which was in the following terms: "Upon hearing counsel on both sides, and upon reading the joint affidavit of the plaintiff and *S. Gosling*, the two affidavits of the defendant, and the affidavit of *T. S. Barnes*, it appearing to my satisfaction that there is probable cause for believing that the defendant is about to quit England, I order that he be detained in custody of the warden of the Fleet Prison, until he shall give bail in the sum of 3000*l.* in this action, *or until further order.*"

An appearance to the action had been entered by the defendant, and no process had been issued against him under the act, in furtherance of the said order.

Sir *J. Campbell* A. G. and *F. Robinson*, now shewed cause. It is understood that the learned judge's order is objected to; 1. because it omits to state that it was shewn to his satisfaction that the plaintiff had a cause of action to the amount of 20*l.*, and that there was probable cause for believing that the defendant would quit England unless detained in custody; 2. because it directs the defendant to be detained in custody until he should give bail, or until further

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order; and 3. because by the third section of the 1 & 2 *Vict.* c. 110, the proper mode of detaining the defendant was not by a judge's order merely, but by a capias or other process founded on such order (*a*).

The seventh section of the act, after enacting that every person in custody upon mesne process, who shall not have filed a petition under the Insolvent Act, shall be entitled to his discharge upon entering a common appearance, provides, "nevertheless, that every such prisoner shall be liable to be detained, or after such discharge to be again arrested, by virtue of any such special order as aforesaid, at the suit of the plaintiff at whose suit he was previously arrested, or of any other plaintiff." The words "special order" refer, it will be said, to the third section, which says that, where it is shewn to the satisfaction of a judge that a plaintiff has a cause of action to the amount of 20*l.*, and that there is probable cause for believing that defendant will quit England, unless apprehended, "it shall be lawful for such judge, by a special order, to direct that such defendant, so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages, and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of capias, &c., which writ of capias shall be in the form contained in the schedule," &c.

The objection that the learned judge has not, upon the face of the order, shewn his jurisdiction, cannot be sustained. It is always to be intended that a judge of one of the superior Courts, had jurisdiction, and it must be presumed that as the

(*a*) A fourth objection was taken on the merits, that there was no probable cause for believing that the defendant, if he were released, would abscond. The ground on which the judgment of the Court proceeded, renders it unnecessary to refer to this part of the argument. It was contended that the Court would not review the discretion exercised by the learned judge on the merits, but no opinion on this point was given by the Court.

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defendant was in custody at the time of the passing of the act, under a regular writ of capias, that it was founded on a proper affidavit of debt. As to the other objection, that the order directs the defendant to be detained in "custody until he shall give bail," or until further order, it cannot be necessary for the order to follow the form given in the schedule of the act for the writ of capias, by which the prisoner is to be detained until he shall have given bail or made deposit according to law, or shall by other lawful means be discharged from custody. Nothing illegal is involved in the direction for detaining the defendant until further order. Leave of the Court was necessary to enable a defendant to get discharged, by paying money into Court in lieu of special bail; and if it be contended that the order should have authorized the defendant's discharge, not only in the event of his giving bail, but also in the event of his making deposit with the sheriff, the answer is, that this latter condition of his discharge is implied, for the making such deposit is by statute rendered tantamount to giving bail. How then is the defendant aggrieved by the omission of that which is necessarily implied by law? Lastly, the order itself, without any capias or other process, is a sufficient authority for the defendant's detention. A capias, as well as a judge's order, may be necessary under the third section, which applies to new cases of arrest, after the passing of the act; but where a party is already in custody, the writ of capias spoken of in section 3 cannot apply; in terms it is only adapted to the case of a party at large, and is directed to the sheriff, and not to the gaoler. The only persons, under the seventh section, to whom a capias can apply, are those who, having already been discharged under the act, are by special order to be arrested a second time, so that the words "by virtue of any special order," are clearly to be read in connection with the words "arrested again" only, and not with the more remote word "detained." Nor is it to be inferred from the use of the word "detained," that a writ of detainer should be resorted to; the word is to be taken

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merely in its popular sense. The judge's order is the operative instrument, and does not in itself abridge the defendant of his liberty, who is already in custody under antecedent process, but is a mere declaration that he is not one of those persons to whom the liberating clauses of the act extend. Even if any process were required in this cause, it was not necessary for the order to say what sort of process it should be.

Sir *W. W. Follett*, *C. Thompson*, and *Dowdeswell*, contrà. The whole question depends upon the meaning of the words "such special order as aforesaid," in the seventh section. If they can be construed to mean any such general order as a judge may make, the present order may be free from objection. But it is clear that "such order as aforesaid" must refer to the order before-mentioned in the third section. That order so referred to is a special order for issuing a writ of capias, according to the form given by the schedule of the act. Now the present order not only does not direct the capias to issue, but prescribes conditions for the defendant's discharge, which are substantially at variance with those contained in the capias. If the judge's order can be made the operative cause of detention, without any capias or other process, such order should at least be in the form of the capias in the schedule, or at all events it should not impose any other terms for the defendant's liberation than those allowed by the act and given in the capias. All prisoners in custody on mesne process at the time of the passing of the act are to be set free. That is the general rule; but in certain excepted cases, a judge has authority to direct the detention of a prisoner until certain things are done, which are enumerated in the act. As this authority does not belong to a judge at common law, but is entrusted to him by statute, it must be strictly followed. It is said the order need not state what process is to issue; even if that be so, the defendant must be discharged, unless the order be the operative instrument, and be good, for it appears on affida-

vit that no process whatever has been issued against him since the passing of the act, and he cannot be considered to be detained on the antecedent process, for he was originally arrested for 9000*l.*, and the order directs him to give bail for 3000*l.* The defendant is materially prejudiced by that term in the order which authorizes his detention until he shall have given bail, "or until further order," for under the old law he would be entitled to his discharge without any further order, not only on giving bail, but also on making a deposit with the sheriff, or paying a sum of money into Court. It is said that the special order and the capias of the third section cannot possibly apply to the defendant. Perhaps not; it is quite enough for the defendant if this be a casus omissus in the exceptive clauses of the act, for he is primâ facie within the general rule, and entitled to his discharge.

Lord DENMAN C. J.—I am of opinion that the order of the learned judge cannot be sustained, and on this simple ground, that he had no jurisdiction to make his own further order one of the conditions of the defendant's discharge.

PATTESON J.—I am of the same opinion. In no one of the writs in use before the new act, is there any such condition of discharge as appears in the present order. The objection, I think, fatal.

WILLIAMS J.—The defendant is detained either under the judge's order or under no authority whatever; he certainly is not detained by virtue of the order under the original process, for he was arrested for 9000*l.*, and the order directs that he shall give bail for 3000*l.* only. If then he is detained under the order, is he properly detained? The order says that he shall be detained until he shall give bail, or until further orders. Now the rule of expressio unius est exclusio alterius applies, and, as there are certainly other

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conditions on compliance with which he would be entitled to his discharge, this order cannot be sustained.

COLERIDGE J. concurred.

Rule absolute.

Sir *J. Campbell* submitted that the Court would merely rescind the order, and not discharge the defendant; but,

Per CURIAM.—The order is rescinded, and there is nothing to prevent his discharge.

Monday, November 26th.

The QUEEN *v.* The MANCHESTER and LEEDS RAILWAY COMPANY.

1. Where an act of parliament for making a railway directed that inquisitions for assessing compensation to the owners of lands required by the Company, should be taken before the sheriff of the county, and that such inquisitions and judgments thereupon should be kept by the clerk of the peace among the records of the county, and be deemed records to all intents, &c.—Held, 1. that certiorari lies, even after judgment, to remove such an inquisition: 2. that the rule to shew cause why the certiorari should not issue, was properly directed to the clerk of the Company, although the inquisition was out of their custody.

2. Where a party has once failed, on account of the insufficiency of his affidavits, to obtain a rule for a certiorari, the Court, in the exercise of its discretionary power over proceedings by certiorari, will not allow him to renew his application on amended affidavits.

A Rule for a certiorari in this case having been discharged in Easter term last, on account of certain defects in the affidavits on which it had been obtained (*a*), Sir *F. Pollock*, on the last day of the following term, moved again for a rule nisi upon amended affidavits. The Court, having taken time to consider whether they would entertain a second application on the subject, on a former day in the present term granted the rule; which called upon the Company to shew cause why a writ of certiorari should not issue to remove into this Court a certain inquisition taken on the 2d of February last, for the purpose of assessing the sum of money to be paid to the prosecutor, *Henry Taylor*, for the purchase of certain lands and buildings taken by the Company under the 6 & 7 *Will.* 4, c. cxi. (local and personal), intituled, "An Act for making a Railway from Manchester to Leeds;" upon notice of this rule to be given to the clerk of the Company. The act directed that, if the owner of any lands,

(*a*) See the former case, 5 N. & P. 439.

liable to be taken under the act, should not agree with the Company as to the amount of purchase-money to be paid for the same, or should refuse such purchase-money as should be offered, and should give notice to the Company within a month next after such offer, and therein request that the matter in dispute might be submitted to the determination of a jury, or if such owner should, for 21 days next after notice in writing should have been given to him, refuse to treat, or should not agree with the Company for the sale of such lands, then the Company should issue a warrant, commanding the sheriff of the county in which such lands were situated to impanel a jury to assess and give a verdict for the purchase-money for such lands, and that the sheriff should then give judgment for such purchase-money so assessed; and the judgment thereon to be given should be binding and conclusive upon all persons whatsoever.

The act directed also, that the verdict of the jury and the judgment pronounced by the sheriff, being first signed by him, should be kept by the clerk of the peace among the records of the quarter sessions, and be deemed records to all intents and purposes.

By an inquisition taken under the Company's warrant in February, 1838, an aggregate sum of 17,000*l.* was awarded to Mr. *Taylor*, the prosecutor in this case, as the purchase-money to be paid him for various lands and buildings required by the Company. The prosecutor objected to the inquisition, on the ground that neither the inquisition nor the warrant set out the notice to the prosecutor to treat, and also denied that any negotiation had taken place between him and the Company, so as to dispense with such notice; and that, contrary to the provisions of the act, certain lands and buildings belonging to him were included in the inquisition, although they were not mentioned in the book of reference or schedule of the act, or certified by justices to have been omitted by mistake.

Affidavits were filed in answer, stating that notice to

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treat had in fact been given to the prosecutor, and that the lands &c., omitted as aforesaid, had been certified by justices to have been omitted by mistake.

Cresswell now shewed cause. There are two preliminary objections to this rule. 1. The prosecutor having once failed in his application, ought not to be allowed to renew it. In 1830 Lord *Tenterden* refused to listen to a second application for a quo warranto against a Mr. *Orde*, for exercising the office of burgess of Berwick. In that case, as in the present, the prosecutor had failed in the first instance, because he came to the Court with insufficient materials. 2. The rule is misdirected. It is directed to the clerk of the Company, who have no control over the instrument to be removed by the writ; for the verdicts and judgments under the act are required to be kept by the clerk of the peace among the records of the county. "A certiorari," it is said in *Vin. Abr.* (*a*) "may be directed to the sheriff *and* coroner to remove an appeal by bill before the coroner, because the sheriff has a counter-roll; but if the certiorari be directed to the sheriff *only* in case of appeal, or indictment, or death, it is not sufficient to remove the record, because he is not judge of the cause, but has only a counter-roll." The party called upon by this rule was neither judge of the cause, nor has he possession of the record. It is said that this inquisition is bad because it does not set out that notice to treat was given to the prosecutor. But the under-sheriff, who is the party to draw the inquisition, would have done wrong if he had introduced into it any such particulars, of which he can know nothing of his own knowledge, and into the existence of which he is not bound to inquire. In all the cases in which the record of proceedings has been invalidated by the omission of certain facts, the omission has been made by parties to such proceedings, and the facts omitted have been within their own cognizance. It is only in these cases that the

(*a*) Tit. Certiorari (B 3), pl. 3.

facts necessary to give jurisdiction must appear; *Kite* and *Lane's* case (*a*), *Rex* v. *Mayor of Liverpool* (*b*), *Rex* v. *Bagshaw* (*c*), *Rex* v. *The Trustees of the Norwich and Watton Roads* (*d*). Nor can the inquisition be quashed, even if the Company have taken lands which the act does not authorize them to take, for in that case the inquisition can give the Company no title, and they may be treated as trespassers (*e*).

Sir *F. Pollock*, contrà. The preliminary objection to this rule, on account of its having been improperly directed to the clerk of the Company, cannot prevail. If the writ of certiorari itself had been so directed, there might be some question on the point; but the Court has now only to decide whether the writ shall issue. [Lord *Denman* C. J. On principle I should have thought that the rule and the writ should be addressed to the parties who have the custody of the instrument in question, for without such instrument they may not be able to shew cause effectually against the rule; but Mr. *Dealtry* informs me that the practice is always that the party interested should have notice, and should shew cause; I think, therefore, the objection is not tenable.] The other preliminary objection, that this application has been made once before and has failed, is sufficiently answered by the Court having granted this rule. [*Patteson* J. Is it clear that a certiorari is grantable in this case? Generally speaking, a record cannot be removed, after judgment, except by writ of error or of false judgment (*f*).] The verdict and judgment here were pronounced *uno flatu*, so that, if we cannot have the remedy after judgment, we cannot have it at any time whatever. The judgment, though made a record by the act, is a most anomalous kind of record; and in *Rex* v. *The Nottingham Waterworks Company* (*g*), this Court appeared to think

(*a*) 1 B. & C. 101; *S. C.* 2 D. & R. 212.
(*b*) 4 Burr. 2244.
(*c*) 7 T. R. 363.
(*d*) 5 Ad. & E. 563; *S. C.* 1 N. & P. 32.
(*e*) See *Reg.* v. *The Bristol and Exeter Railway Company*, 170, n.
(*f*) See *Rex* v. *Scton*, 7 T. R. 373.
(*g*) 6 A. & E. 369; *S. C.* 1 N. & P. 480.

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there would be great difficulty in bringing error upon a record similar to the present. The inquisition under this act of parliament possesses none of the incidents of a verdict at common law; there can be no new trial or arrest of judgment. No jurisdiction can withstand the operation of a certiorari; *Crosse* v. *Smith* (*a*): and in *Groenvelt* v. *Burwell* (*b*) it was held that, wherever a Court with new jurisdiction is created by statute to be exercised according to the course of the common law, a writ of error will lie on the judgment of such a Court; but that, where the jurisdiction is to be exercised in a new course different from the common law, there a writ of error lies not, but a certiorari. Assuming then that a certiorari will lie, the Court will grant it in the present case. It is said that the sheriff, who tries the case, can know nothing about the notice to treat, and that, therefore, it need not appear in the inquisition. But it is the warrant of the Company itself which puts the sheriff in motion, and the requisite notice should at all events have appeared on their own warrant. The other objection to the proceedings of the Company has not been obviated by the answer, that, if they have taken lands which the act does not authorize them to take, the prosecutor will not be prejudiced, inasmuch as their invalid proceedings will confer on them no title; for they have taken various pieces of land from him, for which an aggregate sum has been assessed, and it is impossible for him to know to what portion of that sum he is entitled.

Lord DENMAN C.J. (after stating the objections to the inquisition.)—A doubt has been suggested whether a certiorari will lie in a case like the present. I have now no doubt that it will; but this Court has always possessed over proceedings by certiorari a discretionary power, which it has already exercised in the present term; *Regina* v. *Trustees of South Holland Drainage* (*c*). In that case we thought

(*a*) 3 Salk. 79.
(*b*) 1 Salk. 263.
(*c*) *Ante*, 79.

that the party applying to the Court had disentitled himself to its interference, by an express waiver of the notice directed by act of parliament. It does not appear that there has been any waiver in this case. But on the other hand it appears that notice, in point of fact, was given to Mr. *Taylor*, and he has not been at all misled or damnified by any thing that has taken place. His substantial objection appears to be to the amount of purchase-money awarded to him, and we ought to pause before we exercise our discretionary power in favour of an individual, who has had all the benefit which he could have derived even from the most formal and regular proceedings. And it is most important to remember that the present application is a mere renewal of that which had been made before, and failed on account of the insufficiency of his affidavits. When the present rule was moved for, I thought that, if the Company's proceedings were manifestly defective, we should undoubtedly grant the writ prayed for. I am now of a contrary opinion, and think that we were incautious in granting this rule at all, and that it is quite a sufficient answer to this application to say that it has been made once before, and should not be heard a second time. I was of counsel in the case mentioned by Mr. *Cresswell;* I came a second time to the Court on the same subject, and obtained a rule, which Lord *Tenterden* discharged with costs. Parties must come properly prepared in the first instance, and it is of the utmost importance that we should exercise our discretionary power in cases of certiorari. This rule must be discharged.

PATTESON J.—I remember the case alluded to. I was on the bench at the time, and Lord *Tenterden* laid down the rule most strongly, that second applications on the same matter were to be discountenanced. If the judgment, founded upon this inquisition, were a judgment of a court of record, I have no doubt that certiorari would not lie.

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But it is difficult to say what sort of record this judgment is, for the act is not very intelligible.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged (*a*).

(*a*) The following case was decided in Easter term, on the 9th May, 1838.

The QUEEN *v.* The BRISTOL and EXETER Railway Company.

By a railway act the Company were not to deviate more than 100 yards from the line marked out in the maps deposited with the clerk of the peace, and all disputes respecting damage done to any mansion were to be tried by such persons as usually sit on special juries. There was a clause taking away certiorari in respect of all proceedings taken in pursuance of the act: —Held, that this clause applied, although compensation for lands more than 100 yards from the line prescribed, and for damage done to a mansion, had been assessed by a common jury.

SIR *J. Campbell* A. G., in Hilary Term, 1838, had obtained a rule nisi for a certiorari to remove an inquisition, by which compensation had been assessed to the prosecutor for certain lands in Somerset, taken by the defendants under the 6 *Will.* 4, c. xxxvi. (the Bristol and Exeter Railway Act.)

By the above act it was provided, that no proceeding taken in pursuance of the act should be quashed for want of form, or be removed by certiorari. That the Company should not deviate from the line delineated on the maps or plans deposited with the clerk of the peace, with or without the consent of the owners of the lands, to a greater extent than 100 yards. That matters in dispute, relative to the damage of any mansion, should be tried by a jury, consisting of such persons as are usually summoned on special juries.

The affidavits of the prosecutor shewed that part of his land, for which compensation had been assessed by the inquisition, was 129 yards from the line delineated in the maps, &c.; that the prosecutor's mansion would sustain damage by such deviation, and that, although such damage was one of the matters in dispute, it had been inquired into by such persons as would ordinarily sit upon a common jury.

Sir *W. W. Follett* and *J. Talbot* in the following Easter term shewed cause, and relied on the provision of the act by which the certiorari was taken away.

Sir *J. Campbell* A. G. and *Fitzherbert*, contrà. *Rex* v. *The Trustees of the Norwich and Watton Roads* (*a*), shews that the inquisition is removable unless certiorari be expressly taken away; and *Rex* v. *The Justices of West Riding of Yorkshire* (*b*), *Rex* v. *The Justices of Somersetshire* (*c*), and *Rex* v. *The Rector of St. James's Westminster* (*d*), shew that, where there is an excess of jurisdiction, a clause taking away certiorari will not prevent the interference of the Court. In this case the affidavits manifest an excess of jurisdiction, so that the inquisition

(*a*) 5 A. & E. 563; *S. C.* 1 N. & P. 32.
(*b*) 5 T. R. 629.
(*c*) 5 B. & C. 816; *S. C.* 6 D. & R. 469.
(*d*) 2 A. & E. 241; *S. C.* 4 N. & M. 252.

cannot be deemed a proceeding had in pursuance of the act. [*Patteson* J. If that be so, the proceeding is a mere voluntary act of twelve men. Why do you want a certiorari? You may bring trespass.] Certiorari in such cases has always been allowed for the relief of the subject. The inquisition itself would be an answer to an action of trespass. [Lord *Denman* C. J. Are you aware of *Rex* v. *The Justices of West Riding of Yorkshire* (*a*)?] In that case there was no excess of jurisdiction, but a mere error in the form of the verdict.

Lord DENMAN C. J.—The very object of taking away the certiorari was to prevent such an application as the present. According to the argument of the prosecutor, the smallest deviation from the line authorized by the act would be a fit ground for interference. In *Rex* v. *Somerset* (*b*) there was no jurisdiction whatever, and the whole proceeding was coram non judice. Here there was jurisdiction substantially, though it was exceeded in some respects, and even if there was no jurisdiction certiorari is not necessary to give relief, as there will be a remedy by action of trespass.

LITTLEDALE J. concurred.

PATTESON J.—The clause taking away certiorari, in respect of all proceedings taken in pursuance of the act, cannot be limited to those proceedings only in which the act has been strictly and rigidly pursued, for the clause would then be quite nugatory. This Court directs certiorari to inferior jurisdictions, but not against mere volunteers. Now, if the jury in this case were summoned under the powers of the act they had jurisdiction, and, if they were not so summoned, they are mere volunteers. It is said, that if trespass were brought against the Company for taking the land in dispute, the verdict of the jury would constitute a justification. That is not so, the verdict per se would not be enough, if disputed; but the Company would have to shew every thing necessary to give jurisdiction.

COLERIDGE J. concurred.

Sir *W. W. Follett*. An application has been already made to the Court of Chancery for an injunction in respect of this same matter, and been dismissed with costs.

Rule discharged with costs.

(*a*) 1 A. & E. 563. (*b*) 5 B. & C. 816; *S. C.* 6 D. & R. 469.

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The QUEEN *v.* The Lady and Steward of the Manor of DULLINGHAM.

Where devisee for life, on admittance, has paid a full fine as on an admittance in fee, and the heir of the devisor has surrendered his reversion, the surrenderee cannot compel the lord to inrol the surrender, without payment of the fine payable in respect of the descent upon the heir.

MANDAMUS. The writ, after reciting that *Harriet Pigott*, wife of *William Pigott*, Esq. is lady of the manor of Dullingham, and *Edward Weatherby* her steward, and that divers copyhold tenements are held of the same; that by the custom of the said manor copyhold hereditaments may be surrendered out of Court before two copyholders, and that the lord or lady of the manor and steward of the same for the time being, have always accepted and of right ought to accept all surrenders duly tendered for inrolment, and to inrol the same; that one *Robert King* died in June, 1834, seised of certain hereditaments holden of the said manor, having first duly made his will, and thereby given to his wife *Rebecca* a life estate in the said hereditaments, to which she had been admitted, and had thereupon paid a full fine, that is to say, a fine to the same amount as she would have paid had she been admitted to an estate in fee simple in the said hereditaments; that *Robert William King* was eldest son and heir of *Robert King*, and on the 31st of October, 1835, duly surrendered to two tenants, according to the custom of the manor, all the said hereditaments, subject to the life estate of the said *Rebecca*, to the intents and purposes declared by a certain indenture, bearing even date with the said surrenders, and made between said *R. W. King* of the first part, said *Rebecca* of the second, and *James King*, *John Lyles King*, and *John King*, of the third part, to the use of such persons as *James King*, *J. L. King* and *John King* should by any deeds, &c. during the life of *Rebecca*, but if during her life, or within twenty-one years after her decease, with the consent of said *R. W. King*, limit or appoint; and in the meantime, and in default of such appointment, &c. to the use of said *James King*, *J. L. King* and *John King*, their heirs and assigns for ever; that the said last-mentioned parties had applied to the said lady and steward to accept and inrol the said surrender, which

they had refused,—Commanded them to receive and inrol the same.

The return stated, that said *R. W. King* being the eldest son and heir of the said *R. King*, had never been admitted, nor requested nor tendered himself to be admitted, to the said reversion of the said hereditaments; that the fine paid by the said *Rebecca* was by her paid in respect only of the said estate for life devised to her, and that, beside the said fine so paid, there became and was, on the said surrender being so made, due from the said *R. W. King*, in respect of the said reversion in the said hereditaments, and the said descent thereof to him, a reasonable fine to be fixed and assessed by the lady of the said manor; and that said *R. W. King*, *James King*, *J. L. King*, and *John King*, had refused either to pay the same or give security for its payment.

The following was the statement of the questions proposed to be argued:—

On the part of the prosecution:—1. Whether, a full fine having been paid upon the admission of the tenant for life, further fines are payable upon the surrender, during the life tenancy of those in remainder or reversion. 2. Whether, if further fines be due from those in remainder or reversion, the lord and his steward are justified in refusing to receive and inrol the surrender at the instance of the surrenderees until such fines are paid.

For the lady and steward:—That the admission of a devisee for life is not the admission of the heir of the devisor, taking by descent. That, although an heir at law may surrender without admission, a fine is payable in respect thereof, and that a lord or steward of a manor is not bound to accept or inrol the surrender of an unadmitted heir, unless such fine is paid or secured to be paid to the lord.

A rule having been obtained for a concilium, the case was set down in the crown paper, and argued in Trinity term last by

Sir *F. Pollock* for the Crown (*a*). No fine at all is payable

(*a*) June 2, before Lord *Denman* C.J., *Littledale*, *Patteson* and *Williams* Js.

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upon the surrender of a mere reversion, living the tenant for life, who has paid a full fine upon admission. The heir may always surrender without admittance; no fine can be claimed from him till admittance, and all the defendant has a right to require is to have a tenant, which she has in the present case; *Rex* v. *Lord of the Manor of Hendon* (*a*). Where there is a tenant on the roll it cannot be necessary that the reversioner or the remainder-man should be admitted, before he has any thing to be admitted to. Where tenant for life and remainder-man join in a grant of copyhold, only one fine is due; 2 *Bac. Abr.* Copyhold, (I. 1.) No fine is due, even on the admittance of a remainder-man, after admittance and payment of the fine by tenant for life, unless there be a special custom for it, for the admittance to the particular estate is an admittance to the remainder; *Dean of Ely* v. *Caldecott* (*b*). There can be no doubt that the heir may devise and deal with his estate without admission and without previous payment of the lord's fine, where due on admission; *Right* v. *Banks* (*c*) and *King* v. *Turner* (*d*). 2. It is quite enough, to justify the writ now required, to shew that no fine is due till admittance. But in a case like the present, where nothing is required of the defendants but to inrol the surrender, no fine whatever is payable. Suppose a limitation of copyhold to uses, with a power of revocation, it cannot be contended that a fresh fine would be payable on every exercise of the power by the limitation of new uses.

B. Andrews, contrà. The heir, before admittance, may undoubtedly deal with the estate, yet he is not complete tenant; *Watk.* on Cop. 246 (*e*). If the defendant is entitled to a fine on the descent, it is clear that she would lose her most effectual remedy for it by accepting this surrender, for the surrenderees could compel her to admit them, whether

(*a*) 2 T. R. 484.
(*b*) 8 Bing. 439.
(*c*) 3 B. & Ad. 664.
(*d*) 1 Mylne & Keen, 456; *S.C.* 2 Sim. 545.
(*e*) Citing Co. Cop. s. 41. See note (1) in Coventry's ed. of Watk. 305.

the heir had been admitted or not, so that she could not seize the estate to enforce payment of the fine due upon the descent, and the Statute of Limitations might bar her of any other remedy. This is not the case of tenant for life and remainder-man who have portions of the same estate, as in *The Dean of Ely* v. *Caldecott* (*a*). There is no privity of estate between the tenant for life and the reversioner, and the real question is, whether the reversioner can surrender his estate without compensating the lord for his fine. This very question has been discussed by Mr. *Fearne* (*b*), and the result of his opinion, which seems to have received the countenance of this Court in *Doe* d. *Perry* v. *Wilson* (*c*), is, "That the steward of a manor is at liberty to refuse accepting from the heir a surrender of the reversion expectant on a tenancy for life in a copyhold estate, until payment of the fine due by the custom on the descent." The reason given by Mr. *Fearne* for his opinion has been already suggested, that, if the steward were compellable to accept the surrender, the lord would lose his remedy for his fine upon the descent. Nothing at all turns on the fact, that the tenant for life has paid a full fine. A tenant for life must pay a whole fine, just as if he were tenant in fee, in cases where the heirs are fineable; *Watk.* on Cop. 311.

Sir *F. Pollock*, in reply. The object is simply to inrol the surrender for safe custody, that the title may not perish. The inrolment of the surrender would work nothing, and the lord would not be bound by it. The estate is not changed by the surrender. The surrenderees might disclaim. [*Andrews*. On the other hand, they might not disclaim.] In *Rex* v. *Wilson* Lord *Tenterden* said, "By the common law, a copyhold estate in fee, after surrender, remains in the surrenderor and his heirs until the surrenderee is admitted." In that case the devisees actually dis-

(*a*) 8 Bing. 439.
(*b*) Posthumous Works, Cases and Opinions, p. 103.
(*c*) 5 Ad. & E. 321.

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claimed, and the heir was held entitled to admittance. [*Littledale* J. referred to *Gyppen* v. *Bunney*] (*a*).

Cur. adv. vult.

Lord DENMAN C. J., on the 3rd November, delivered the judgment of the Court.—After stating the particulars of the writ and return, his lordship continued as follows: The return in substance states, that the lady of the manor and steward have refused to do what is required, because the said *Robert William King*, and the said *James King*, *John Lyles King*, and *John King* refuse to pay any fine for the acceptance and inrolment of the said surrender; and whether any fine be lawfully due to the said lady of the manor under these circumstances is the question. Against the return, and in support of a peremptory mandamus being awarded, it was contended, that the lady has a tenant on the roll who has paid a full fine; that the admittance of tenant for life is the admittance of him or them in remainder; that nothing was required by the acceptance and inrolment of the surrender, but safe custody; and that, if any fine be due and payable, it becomes so only upon a tenant being presented for admittance, and after such admittance; which several propositions, with the exception of one, may, as it seems to us, be admitted, without affecting the conclusion which they were advanced to establish. The exception to which we allude is, that the present was incorrectly assumed to be a case of tenant for life with a remainder or remainders dependent thereon; whereas we are apprised of no provision of the will of *Robert King*, except the devise of a life estate to his wife, and therefore the interest of the heir was clearly reversionary and not a remainder. For reasons, however, which will appear presently, we do not consider it necessary to pursue this distinction. Still less is it requisite, for the purposes of the present discussion, to consider the nature and extent of the

(*a*) Cro. Eliz. 504.

heir's interest in a copyhold before admittance. This subject was very fully entered into by this Court in the case of *Right* v. *Banks* (*a*), and by the Lord Chancellor *Brougham* in *King* v. *Turner* (*b*). That the heir is, for many purposes, perfect tenant of the land before admittance, especially as to strangers, is true, but he is not as *to all*. The general rule and the exception are given with sufficient distinctness in *Coke's Copyholder*, sect. 41. "In admittances upon descents, the heir is tenant by copy immediately upon the death of his ancestor, not to *all* intents and purposes, for peradventure he cannot be sworn of the homage before, neither can he maintain a plaint in the nature of an assize in the lord's court before, because till then he is not *complete* tenant to the lord, no further forth than the lord pleaseth to allow him for his tenant So that, to all intents and purposes, the heir till admittance is not complete tenant; yet to most intents, especially as to strangers, the law taketh notice of him as of a perfect tenant of the land, instantly upon the death of his ancestor; for he may enter into the land before admittance, take the profits, punish any trespass, surrender into the hands of the lord to whose use he pleaseth, *satisfying the lord his fine due upon the descent*." Again, in *Brown's* case (*c*), we find that the "heir may surrender to the lord to the use of another before admittance, as any other copyholder may, *but it cannot prejudice the lord of the fine due to him* by the custom of the manor upon the descent." Also, in *Brown* v. *Dyer* (*d*), it is said "the heir may surrender before admittance, because he has a title by descent, *but the lord in this case shall have a fine*." In *Morse* v. *Faulkner* (*e*) it is said, "in copyholds the heir takes without actual admittance, and may surrender and convey without it, which he could not do if he were not seised, *but the Lord is in that case entitled to the double fee upon the surrender*." See *Fearne's Posthumous Works*, p. 103, (Cases and Opinions).

(*a*) 3 B. & Ad. 664.
(*b*) 1 Mylne & Keen, 456.
(*c*) 4 Rep. 22 b.
(*d*) 11 Mod. 73.
(*e*) 1 Anst. 13.

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The lady of the manor, it is to be observed, in the present instance seeks for nothing: there is no demand on her part to the heir to come in and be admitted, in order that she may become entitled thereby to the accustomed fine. The demand is *upon her* to do an act, and she insists that the demand can only be made by one who is (in the language of Lord *Coke*) "to all intents and purposes" a tenant of her manor. This case, therefore, has no resemblance to those on which a question has arisen between the heir and a stranger. Here it is a mere question of right between the lady of the manor and the heir, and upon such question we think she is entitled to have (as we find him called) "*a complete tenant.*" The payment of a fine is the method by which, according to all the authorities above referred to, a recognition is made of the title under which he holds, and according to all of them, a fine becomes due upon an act being done like the present. In conformity hereto also, it seems, was the opinion of Mr. *Fearne*, which, in addition to the weight justly due to it from his great and acknowledged accuracy and precision, in the recent case of *Doe* d. *Perry* v. *Wilson*(*a*), was recognized by this Court as to the point now immediately under consideration. The subject is thus treated by him; "there can be no question that the heir is compellable (if the lord please) to come in and pay the fine due on a descent; and it is said that where the lord is to have a fine there must be a new admittance; vide *Tiping* v. *Bunning*(*b*). If so, I should think the lord may (if he please) refuse a surrender by the heir until he has paid the fine on descent. Indeed, if he could not, the lord might be disappointed of his fine; for, after the accepting of the surrender tendered by the heir, though a conditional one, and the surrenderees being admitted on the forfeiture of the condition, who of course could be liable to only the alienation fine on such an admission, where would be the lord's remedy for his fine upon the descent? And though the lord cannot compel the heir to come in and be admitted and pay his fine during the life of the tenant for life, yet, if the heir

(*a*) 5 Ad. & E. 321. (*b*) Moore, 465.

require to surrender before, I apprehend, the lord may refuse accepting his surrender until he pay such fine, for otherwise he may be disappointed of it, by accepting the surrender from the heir to the use of a stranger, who would be entitled to admission under it (even though conditional, if forfeited) upon payment of the alienation fine only (*a*)." The question, it will be perceived, has been hitherto considered as if the application had been made by the heir of the party last seised. If, however, it ought rather to be deemed an application by mere strangers, our observations will be applicable à fortiori, and in the writ of mandamus itself it is stated that the said parties of the third part to the said indenture to lead the uses of the said surrender, being desirous of having the said indenture inrolled by the said lady of the said manor, did cause application to be made to the said lady, to receive and inrol the said surrender for the purposes therein (that is, in the said surrender) mentioned, that is, persons wholly unconnected with the lady of the manor (so far as appears) either by duty or service, without any offer to acknowledge her as lady, but expressly refusing so to do, require her to do an act which none but a tenant is entittled to ask: which act, it is moreover to be observed, is not calculated or intended in any degree to confirm or establish the life estate of the said widow, to which she had been admitted regularly, and had paid her fine accordingly, but for purposes wholly unconnected with and independent of it.

Upon the whole, therefore, we are of opinion that the return is good, and that a peremptory writ of mandamus ought not to go.

Judgment for the defendants (*b*).

(*a*) Fearne's Post. Works, 106.

(*b*) See *Doe* v. *Lawes*, 2 N. & P. 3rd point, 195.

END OF MICHAELMAS TERM.

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VACATION SITTINGS IN BANC,

AFTER MICHAELMAS TERM (a).

Saturday, December 1st.

The QUEEN *v.* The Inhabitants of SOMERBY.

A pauper having been bound by indenture to a carpenter, met with an accident, and became unable to work; he was in consequence taken home to his father's parish by his master, for the benefit of a surgeon's attendance, whom the master promised to pay, but did not; and the pauper slept at his father's for more than 40 days, at the end of which time the indenture was cancelled. During this period the master called upon the pauper and asked him to carry out and sell lottery tickets, on which he was to receive 1*s.* a ticket, the prizes being articles manufactured by the master in his trade:—Held, that such service was connected with the apprenticeship, and that therefore a settlement was gained by the 40 days' residence in the father's parish, though the selling the lottery tickets might be an illegal employment.

ON an appeal against an order of two justices for the removal of *John Dixon*, his wife and family, from the parish of Melton Mowbray to the parish of Somerby, the Leicestershire quarter sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper *John Dixon* was, by indenture bearing date September 21, 1805, bound apprentice to *William Lane*, of Somerby, carpenter and joiner, from the 5th day of the same month, for the term of seven years. The indenture contains covenants that the pauper should do all lawful commands of his master, and that his master should find him board, lodging and washing during the term. The pauper served six years and two months in Somerby under his indenture, when he met with an accident and became unable to work; he was in consequence taken by his master, on the morning following the accident, to his father's house in Melton Mowbray (which is six miles from Somerby), for the benefit of a surgeon's attendance, and he slept at his father's house in Melton Mowbray from that time until the cancellation after-mentioned, being a period of more than 70 days. His master called upon him at his father's house from time to time to see how he was, and during that time and whilst he was incapacitated from his ordinary employment under the indenture, his master asked him to carry out and sell, in the villages round about Melton Mowbray, lottery tickets, by which the holders would

(a) Under the 1 & 2 *Vict.* c. 32, the Court sat in Banc on Tuesday the 27th of November, and the four following days.

be entitled to draw in a lottery, where the prizes were the articles manufactured by the master in his trade; which the pauper consented to do, and did, up to the cancellation after-mentioned. As a compensation for this service the pauper was to receive and did receive one shilling on the sale of each ticket, which his master observed would help to maintain him. The master also, on first taking the pauper to Melton Mowbray, promised to pay the surgeon his bill, but failing to do so, the pauper paid it himself. On the 1st of February, 1812, the pauper's father bought out his (the pauper's) time for two guineas, which he paid to the master, and the indenture was cancelled on that day, and the master received such tickets as remained unsold.

The questions for the opinion of the Court are, whether under the circumstances there was either maintenance of the apprentice by the master, or service by the apprentice, in Melton Mowbray, under the indenture. If the Court should be of opinion that there was either such maintenance or such service, the order of sessions to be quashed, if otherwise, to be confirmed.

Sir *W. W. Follett* and *Burnaby* (with whom was *N. Goldsmid*), now appeared in support of the order of sessions. The cases are contradictory on the subject of gaining a settlement, where the pauper apprentice does not reside with his master; but the present case seems to fall within the decision of *Rex* v. *Ilkestone* (*a*). There the pauper, by his master's permission, slept at his father's house on Saturdays and Sundays; and it was held that his so sleeping there was not connected with the apprenticeship, so as to confer a settlement. In *Rex* v. *Stratford-upon-Avon* (*b*), the pauper left his master on account of illness, and went to reside with his mother, but he also went every day to his master's, and was employed by him in errands. [*Williams* J. That case does not seem distinguishable from the present. The employment in this case

(*a*) 4 B. & C. 64; 6 D. & R. 64. (*b*) 11 East, 176.

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was not under the indenture, nor was it there, but still it was the employment of the master.] In that case the employment was legal; in the present case several statutes have made the sale of lottery tickets illegal; viz. 10 & 11 *Will.* 3, c. 13; 42 *Geo.* 3, c. 119. The present case, therefore, is not like *Rex* v. *Banbury* (*a*), where the master employed his apprentice in selling corks. The employment, therefore, being illegal, it cannot be in any way referred to the apprenticeship. The promise to pay the surgeon's bill is a mere *nudum pactum*, as the master was only bound under the indenture to provide board and lodging: and although in *Wennall* v. *Adney* (*b*) Lord *Alvanley* C. J. said that medicine might be considered as necessaries, that dictum would not apply here, as the present was only a surgical case.

J. Hildyard, contrà, was not called on by the Court.

Lord DENMAN C. J.—In this case I think there is no doubt that the relation of master and apprentice did continue during the time of the pauper's residence in Somerby. I do not mean to say that if a master and his servant conspired to do an illegal act, a service in furtherance of their object could be relied upon as conferring legal rights; but it would be very hard upon an apprentice, who innocently complies with the commands of his master, to be afterwards told that he ought to have disobeyed the orders, as they were contrary to law. This case is not to be distinguished in principle from *Rex* v. *Banbury* (*a*), and *Rex* v. *Stratford-upon-Avon* (*c*).

LITTLEDALE, PATTESON and WILLIAMS Js. concurred.

Order of Sessions quashed.

(*a*) 3 B. & Ad. 706; 3 N. & M. 205.

(*b*) 3 B. & P. 247.

(*c*) 11 East, 176.

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ALLASON and others v. STARK.

Tuesday, Nov. 27th.

1. A devise of lands to trustees, as to one moiety, for the relief of the most poor and needy people, of good life and conversation, of a parish, and as to the other moiety, for putting out poor boys apprentices, does not constitute the lands parish property, so as to vest them in the churchwardens and overseers of the parish, under the 59 *Geo.* 3, c. 12, s. 17. *Semble*, that the 59 *Geo.* 3, c. 12, s. 17, does not operate to take parish property vested in *trustees* out of the trustees, and vest it in the churchwardens and overseers.

2. Parochial tustees, under the authority

USE and occupation for land in the parish of Kensington, in the county of Middlesex. At the trial before Lord *Denman* C.J., a verdict was found for the plaintiffs, damages 60*l.*, subject to the opinion of the Court upon the following case.

The plaintiffs are trustees of the charity estates mentioned in an act of parliament passed in the 17 *Geo.* 3, c. lxiv. (local, public), and intituled "An Act for the better Relief and Employment of the Poor of the Parish of St. Mary Abbotts, Kensington, in the County of Middlesex, and for other purposes therein mentioned." The defendant is one of the trustees for executing the said act.

The case set out a deed of feoffment of a piece of land, called Butt's Fields, to feoffees in trust, "with the rents and profits of the premises from time to time for ever to be received, faithfully and truly to perform and discharge the several uses, trusts, and intents mentioned and expressed in the last will of the Right Honorable *Elizabeth* Viscountess Dowager *Cambden*, deceased, amongst many other gifts, legacies and bequests therein, touching the gift of 200*l.* to the said feoffees, and a purchase to be by them made with the said 200*l.* for the performance of those uses and intentions;" the tenor of part of which said will and testament, as to the said gift of 200*l.*, was expressed in a schedule indented to the said indenture annexed.

The land so conveyed forms part of the charity estates mentioned in the act of parliament 17 *Geo.* 3, c. lxiv. The trustees of the charity estates, after the passing of that act from time to time let and demised the said charity estates

of a local act (17 *Geo.* 3,) had built a workhouse on lands belonging to charity trustees in the same parish, and in 1821 disputes arose between the two sets of trustees, as to whether any rent was payable therefore, and the question was brought before the Master of the Rolls by an amicable suit in 1821, who decreed that a certain rent should be paid by the parochial trustees, which was accordingly paid till 1833:—Held, that use and occupation might be maintained for the rent in arrear from 1833, as the decision of the Master of the Rolls was binding upon the parties, and that the payment of rent under the circumstances was an estoppel on the parochial trustees.

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on building leases, by virtue of the powers given by the said act; and the trustees of the charity estates now exercise the powers and authorities vested in them under and by virtue of that act.

Shortly after the passing of the said act the trustees for executing the act erected a workhouse for the poor of the said parish, upon a part of Butt's Field, part of the charity estates.

In February, 1821, disputes arose between the trustees under the act and the trustees under the feoffment, concerning the rent and amount of ground-rent fit and proper to be paid by the said trustees for executing the said act, to the trustees of the said charity estates. The trustees of the charity lands, to determine the same, preferred their petition on the 7th of February, 1821, to the Master of the Rolls, whereby the said trustees of the charity estates insisted that the trustees for executing the said act ought to pay the trustees of the said charity estates a fair and adequate rent for the use and occupation of the said land and premises in their possession, and the trustees for executing the said act insisted that no such rent should be rendered for the same: And the said trustees of the charity estates therefore prayed that rent should be ordered to be paid to them by the trustees for executing the said act, and that it might be referred to one of the Masters to inquire and certify what would be a reasonable and proper rent to be paid.

On the 14th of February, 1821, by an order of the said Court of the Rolls, it was declared that the trustees of the charity estates were seised in fee of the said land and premises in the said declaration mentioned, subject to certain interests as therein mentioned, and ordered to be referred to one of the Masters of the said Court to consider and state to the Court what ground-rent the trustees for executing the said act should pay to the trustees of the said charity estates for the said land: and the said Master afterwards, on the 14th of January, 1822, by his report stated, that the annual sum of 40*l.* was a fit and proper ground-rent to be paid by the said trustees for executing the said

act to the said trustees of the charity estates. And the said Court of the Rolls afterwards, on the 28th of January, 1822, all parties concerned being ordered to attend and being there present, ordered that the said report be confirmed, and that the sum of 40*l.* a year, as a fit and proper ground-rent, be paid by the trustees for executing the said act to the trustees of the charity estates, from the 7th of February, 1821, for the said land. In this suit the same solicitor acted for both parties.

From February 1821, to February, 1833, inclusive, the trustees for executing the said act have regularly paid the said yearly rent or sum of 40*l.* per annum to the trustees of the said charity estates, for the use and occupation of the said land, and there is now rent in arrear for one year and a half, amounting to 60*l.*; and the defendant, who became a trustee for executing the said act in 1828, and has continued so ever since, was present as such trustee at a meeting in 1829, duly convened, of the trustees for executing the said act, whereat the said trustees passed a resolution to pay the above-mentioned rent, the defendant on that occasion neither assenting nor dissenting to such resolution, although he has on several occasions expressed his opinion that such rent ought not to be paid. It is agreed that either party may refer to any of the acts of parliament and to the record. If the Court shall be of opinion that the plaintiffs, as trustees of the charity estates, are entitled to recover payment of the rent in this action from the trustees for executing the said act of parliament, the verdict for 60*l.* is to stand, otherwise a nonsuit is to be entered.

The question for the opinion of the Court, on behalf of the plaintiff, is, 1st, Whether the legal estate of the land is now in the trustees of the charity estate: and, 2dly, Whether the defendant is not estopped (under the facts stated) from denying the plaintiff's title to recover payment of the rent now in arrear. And the question for the opinion of the Court, on behalf of the defendant, is, 1st, Whether the trustees for executing the act are, by the provisions of the

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local act, empowered to take a portion of the charity estates for the erection of a workhouse, without payment of rent: and, 2dly, Whether the scite of the workhouse in question is vested in the churchwardens and overseers by the statute 59 *Geo.* 3, c. 12, s. 17 (*a*). The verdict is to

(*a*) The preamble of the local act (the 17 *Geo.* 3), recited that the poors' rates in the parish of Kensington were daily increasing, and that it was desirable a sufficient workhouse should be provided and put under the care of proper persons annually appointed; and also, in the year 1757, that a conveyance had been made to Dr. *Wilcox* and others, parishioners of the said parish, of two pieces of land called Charecrofts, purchased with a legacy of 200*l.* under the will of Lord Viscount *Cambden*, dated 1629, "to be yearly employed for the good and benefit of the poor of the parish of Kensington, in such manner as certain trustees therein named, since deceased, and the churchwardens of the parish of Kensington for the time being, should think fit to establish;" and also of another piece of land called Butt's Fields, purchased with a legacy of 200*l.* given by the will of Viscountess Dowager *Cambden* to certain trustees, since deceased, and the churchwardens of the said parish church of Kensington for the time being, to be laid out in lands "in trust (as to one moiety thereof), that it should be and remain from time to time, for ever, for and towards the better relief of the most poor and needy people that should be of good life and conversation in the said parish, and the other moiety to be and remain for ever (yearly), for putting out poor boys apprentices (the poors' moiety to be paid to them by the churchwardens half-yearly, as therein mentioned);" and a messuage &c. was vested in the said Dr. *Wilcox* and the said parishioners, their heirs and assigns, "upon trust that the said trustees should apply the rents and profits for the use of the poor of good life and conversation of the said parish; and as to one-fourth part of the said rents and profits for the putting out one or more boys apprentices under the wills of Viscount and Viscountess *Cambden*, deceased; which estates are now let out upon leases for short terms of years at the annual rent of 54*l.* The preamble then recited that proposals had been made to the said trustees and churchwardens for a lease of Butt's Fields, Charecrofts, and the said messuage &c., for the purpose of building thereupon, at very considerable improved rents (provided they were enabled to grant building leases, &c.), and the vicar, churchwardens, and overseers of the poor, and parishioners of the said parish, were desirous that the same estates should be so let out in such manner as should be thought most beneficial to the said trusts, and that the rents, profits, and produce of such part of the said charity estates as belong to the poor of the said parish be from time to time applied in aid of the poors' rates, for pay-

stand, or a nonsuit is to be entered, as the Court may decide upon the several questions.

Sir *W. W. Follett* now argued the case for the plaintiffs. Independently of the local act (*a*), the defendant is estopped, under the circumstances of the case, from contesting the plaintiff's right to recover the amount of rent due. It appears by a friendly suit (for the same solicitor acted for both parties) that the Master of the Rolls, upon appeal in 1821, decreed that the fee of this land was in the charity trustees, and that 40*l.* a year rent should be paid; which rent has been paid from that time down to 1833. How then can the defendant now dispute that the rent is payable? II. These charity estates are not vested in the churchwardens and overseers under 59 *Geo.* 3, c. 12, s. 17 (*b*); for they are not parochial property, but are vested in particular persons for special purposes, in which

ing the interest of monies to be borrowed on annuities to be granted for raising monies to be invested and applied in the purchase of ground and erecting a workhouse for the poor of the said parish; and that a proportionable part of the said rents and profits should be applied for putting out poor boys of the said parish apprentices.

The act also contained powers to authorize the trustees of the charity estates to grant building leases, and authorized certain parishioners, as trustees for carrying the act into effect, to build a workhouse, and borrow money for the purpose.

Sect. 21 authorized and required those trustees to erect a workhouse "upon either part of the said charity estates belonging to the poor of the said parish, or upon any ground to be either purchased or hired for that purpose," . . . . . "and by and out of the monies to arise by virtue of this act to pay and satisfy all monies which shall be justly due to the workmen &c. employed in and about the erecting the said workhouse.

This act was amended and enlarged by an act passed in the 7 *Geo.* 4, by s. 36 of which, any one trustee was permitted to be sued for the whole, but he was not to be personally liable.

(*a*) The argument on the local act, which turned principally upon s. 21, as to whether the trustees of the act were bound to pay rent to the charity trustees for the scite of the workhouse, is omitted, as of no general importance.

(*b*) That section enacts, "that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on by lease, by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes

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case the act does not apply; *Doe* v. *Hiley* (*a*), *Rex* v. *Halesworth* (*b*).

Sir *J. Campbell* A. G. contrà. I. Use and occupation cannot be maintained against the defendant, for nothing like a contract can be suggested or implied. The decree of the Master of the Rolls cannot operate as an estoppel: whatever weight it may have in a Court of Equity, it cannot determine the rights of parties in an action for use and occupation, or confer on the charity trustees a right of action which they did not before possess. Even if there had been any promise on the part of the defendant, it would have been *nudum pactum*, as he is a mere trustee, and there is no consideration. It is true it has often been held, that a lessee cannot dispute his lessor's title; but that has been where he has received possession through or by the permission of the lessor. Here possession has been given by the law, and there was neither a contract nor a demise. All that has taken place has been a mere payment of rent; if that rent was not due, it is open to parties to contend that nothing has been ever due. *Rogers* v. *Pitcher* (*c*) is a case in which the tenant of the land had paid rent to a claimant; and it was held to be no estoppel upon him, but only primâ facie evidence of a tenancy, which he might rebut by evidence; and he succeeded in so doing. There, as in the present case, the tenant had not obtained possession from the person claiming as landlord. *Gibbs* C. J. there said, "Till the statute of *Anne*, if a lord conveyed a reversion, by the attornment of the tenant the rent would

of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such lands, buildings and hereditaments, and also all other buildings, lands and hereditaments belonging to such parish."

(*a*) 10 B. & C. 885; *S. C.* 5 Mann. & R. 706.

(*b*) 3 B. & Ad. 717.

(*c*) 6 Taunt. 202.

pass, though not before attornment; but it never yet was supposed that attornment alone, without any conveyance, would carry the rent. Unquestionably the law is not so." That case has been confirmed by several subsequent decisions; *Grævenor* v. *Woodhouse* (*a*), *Gregory* v. *Doidge* (*b*), *Brook* v. *Biggs* (*c*). II. The 59 *Geo.* 3, c. 12, s. 17, is not to be construed so narrowly as is contended for on the other side. The language of the section is quite sufficient to vest these estates in the churchwardens and overseers, and the spirit of the act also comprehends them. These estates are clearly parish property, though the proceeds may not be applicable solely to paupers. The intention of the act was to protect property similarly vested in trustees, by giving it at once to the churchwardens and overseers, whom it constitutes a corporation for this purpose, and thereby to obviate the necessity for searches after the heir-at-law, or executor of the last surviving trustee. [Lord *Denman* C. J. The intention of that act was to vest parochial property in the churchwardens &c., as it was constantly found, when litigant parties came before the Court, that it was impossible to discover where the title was. But suppose in this case that Lady *Cambden*'s trustees had a private trust also?] That does not at all appear. The donation of Lady *Cambden* is for strictly parochial purposes; viz. for the relief of poor and needy people of the parish, and for the apprenticing out poor boys. [*Patteson* J. It would be a most extraordinary construction of the 59 *Geo.* 3, c. 12, to hold that it takes trust property out of one set of trustees to place it in another. If the legislature intended this, why did they not enact in express terms that all property, charitable as well as parochial, should be vested in the churchwardens? What authority have you for this proposition?] In *Doe* v. *Hiley* (*d*,) where lands had been demised by trustees on behalf of the parish, and the proceeds appro-

(*a*) 1 Bing. 38.
(*b*) 3 Bing. 474.
(*c*) 2 Bing. N. C. 572.
(*d*) 10 B. & C. 885; *S. C.* 5 Mann. & R. 706.

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priated to the payment of church-rates, and not to the support of the poor, the Court held that the lands were vested in the churchwardens and overseers, under the 59 *Geo.* 3, c. 12, although there was a devisee of the surviving trustee in existence. It was contended that the 59 *Geo.* 3, c. 12, s. 17, did not apply to that case; first, because the persons in whom the legal estate was vested were trustees; and, secondly, because the funds in question were not applicable to the relief of the poor. Lord *Tenterden* C. J. held, first, "that there is nothing in the act of parliament to prevent property held by trustees, for the benefit of a parish, vesting in the churchwardens and overseers; and it would be very inconvenient that it should be so. It is often difficult for persons who claim under an ancient trust (where the trustees are numerous), to ascertain who was the survivor of those trustees; and even if they succeed in ascertaining that fact, it will not be less difficult to shew who is the heir-at-law of that survivor. Property vested in trustees for the benefit of the parish seems within the mischief contemplated by the legislature equally with property not so vested." With regard to the latter point the Court said, that the latter words of s. 17 "are most general, and comprehend all *buildings*, lands and hereditaments belonging to the parish; and although the poor may be the primary object of this statute, we think the safest course for us to adopt, in construing this section of the act, will be to give full effect to that generality of expression; there being nothing to shew that lands or buildings which are applied in aid of the church-rate do not require the aid of this provision, as well as those which are applied to the relief of the poor." In the present case the provision is exclusively for the benefit of the poor. [*Coleridge* J. *Doe* v. *Terry* (*a*) is rather in your favour; as the marginal note of that case is, that by the 59 *Geo.* 3, c. 12, s. 17, all parish property is vested in the churchwardens &c. for the time being.]

(*a*) 5 N. & M. 556.

Sir *W. W. Follett*, in reply. *Doe* v. *Hiley* (*a*) is not an authority for the position contended for. In that case the parish lands had been vested in feoffees, all of whom were dead at the time of the ejectment, and the last surviving feoffee had devised all his estate, subject to his debts, to his brother, who was not his heir-at-law. There was, therefore, a difficulty in tracing the legal estate; a demise was inserted by the churchwardens and overseers, and the Court held that the statute had vested the estate in them. It is not stated in that case to what purpose the proceeds of the trust lands were to be applied; and the first mention that is made of them is in 1786. But the case is no authority to shew that the 59 *Geo.* 3 takes lands out of one set of trustees to vest them in another. In the present case, the objects for which the rents and profits are to be applied under Lady *Cambden's* will are clearly not parochial, as is shewn by *Rex* v. *Hulesworth* (*b*), where lands were devised to be applied, one half for the relief of widows, and the other half towards binding out apprentices by the parish; and it was held that this did not form a public parochial fund within the 56 *Geo.* 3, c. 139, s. 11. With regard to the decision of the Master of the Rolls, it is submitted to be clearly binding. If two parties agree to refer a matter to arbitration, and an award is made, it cannot be further contested between them; *Doe* v. *Rosser* (*c*). So also the payment of the rent is conclusive, unless it could be shewn that it was in ignorance of the facts, or through misrepresentation, as in the cases cited.

Lord DENMAN C. J., after deciding on the 17 *Geo.* 3, that the parish trustees were not entitled to hold the charity lands without payment of rent, continued thus:—But it is said, secondly, that these lands have vested in the churchwardens and overseers under 59 *Geo.* 3, c. 12, s. 17, and the decision in *Doe* v. *Hiley* (*a*) is relied on. The language of

(*a*) 10 B. & C. 885; *S. C.* 5 Mann. & R. 706.
(*b*) 3 B. & Ad. 717.
(*c*) 3 East, 15.

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Lord *Tenterden* in that case is certainly very large. But I think when we consider that language with reference to the subject-matter, his words must receive a limited construction. For the question there was, whether the legal estate had not vested in the churchwardens and overseers when the trustees were all dead, and the heir-at-law of the last surviving trustee did not appear to be known. The very mischief, therefore, which the act was intended to remedy, had occurred; and Lord *Tenterden*'s expressions refer to that case only. With this explanation I think the case perfectly satisfactory. But I cannot believe that the intention of the act was to divest parties of special trusts which had been conferred upon them (which construction would apply to any subsequent devise to trustees), and to transfer them to the churchwardens and overseers, merely for some small benefit to the parish. And I am happy I can come to this conclusion without infringing upon *Doe* v. *Hiley* (*a*). It is not necessary to go further and say that I think the decision of the Master of the Rolls binding upon the parties. In my opinion he decided quite rightly; but whether he did or not, I consider that his decision was conclusive, because the parties referred the matter to him. With regard to the payment of rent, there are no circumstances at all to rebut the presumption that arises from it.

PATTESON J.—I agree upon all points. It appears that there had been an amicable suit, and a decision of the Master of the Rolls, on this question. I think that decision was right, and if it was *res integra*, I should think it the proper one to be arrived at. Besides which, the parties seem to have acquiesced in it, by payment of rent down to 1833. Acquiescence for so long a time raises a very strong presumption that the parties were satisfied with the arrangement. It is not at all like *Rogers* v. *Pitcher* (*b*), where the rent was paid in ignorance of the facts. With regard to *Doe* v. *Hiley* (*a*), I agree that the right conclusion has been

(*a*) 10 B. & C. 885; *S. C.* 5 Mann. & R. 706. (*b*) 6 Taunt. 202.

drawn from it. For myself, I should wish to abstain from laying down that the 59 *Geo.* 3, c. 12, takes parish lands out of trustees, and vests them in the churchwardens; though it is true that *Doe* v. *Hiley* (*a*) goes very nearly to establish that proposition, but I do not think it does quite. It is sufficient to say here that this was not a trust for the parish, but a special trust; viz. for needy persons of good life and conversation, and not for the purposes generally of the parish. There would be great inconvenience if we were compelled to come to any other decision; for if the churchwardens and overseers were to be held to be the legal owners of such trust estates, the funds would be mixed up with the general funds of the parish, and the special objects of the trust might be lost sight of.

WILLIAMS J.—I am of the same opinion. With regard to the payment of the rent, so far from there being any circumstance to rebut the presumption, I do not recollect any case in which the payment of rent has offered more stringent evidence.

COLERIDGE J.—I think this is a clear case. In the first instance the plaintiffs made out a strong primâ facie case of landlord and tenant—a payment of rent for many years—there being no suggestion of fraud, and no misapprehension of the facts. The only answer capable of being made to the case arises on the construction of the 17 *Geo.* 3, and the 59 *Geo.* 3, c. 12. With regard to the latter it is sufficient to say that these lands are not parish property, but were given by Lady *Camden* for certain specific objects of her bounty. *Doe* v. *Hiley* (*a*) does not conflict with this view of the case; for there the funds were disposed of in aid of the church-rate, which was a parochial purpose. So also in *Doe* v. *Terry* (*b*) the fund was applied for the general purposes of the parish.

Postea for the plaintiffs.

(*a*) 10 B. & C. 885; *S. C.* 5 Mann. & R. 706. (*b*) 5 N. & M. 556.

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FERGUSON *v.* MAHON.

Debt for 180*l.* the amount of two years' rent. Plea, as to 135*l.* parcel &c. payment to a superior landlord to avoid a distress. The replication admitted the payment, but stated that it had been deducted at the time from the rent due to the plaintiff, and that 135*l.* was due to the plaintiff, over and above the sum &c. deducted. Rejoinder, that the said sum was not deducted *absque hoc;* that 135*l.* was still due to the plaintiff. The plaintiff, in his particulars of demand, gave credit for payment of the first year's rent, minus 16*l.* 6*s.* 2*d.*, and proved that 106*l.* 16*s.* 2*d.* was due to him, after allowing for all payments: —Held (before the Rule of Trinity term, 1838), that the particulars were not to be taken as embodied in the declaration; that the plea of payment of 135*l.* did not apply to the mere balance of 106*l.*, remaining after deduction of the sum for which credit was given in the particulars, and that the plaintiff was entitled to a verdict for such balance.

DEBT for rent. The second count was on an indenture of lease, whereby the plaintiff demised to the defendant a certain house, to hold, from the 1st of November, 1829, for seven years, at 90*l.* per annum, and claimed two years' rent, due 1st November, 1836.

Plea, as to 135*l.*, parcel of the said rent, that the plaintiff held the premises as tenant to one *Carter*, at 90*l.* per annum; that before and at the time when the 135*l.* in the plea mentioned became due, 135*l.* was in arrear from the plaintiff to *Carter*, who claimed the same of the defendant, and that the defendant, to avoid a distress upon his goods, paid to *Carter* several sums of money amounting to 135*l.*

The replication admitted the payment to *Carter*, but stated that the several sums of money paid were deducted by defendant at the several times when they were paid out of rent due at those times from the defendant to plaintiff, and that at the commencement of this suit 135*l.* was due from the defendant to the plaintiff for rent, over and above the several sums so paid and deducted by the defendant.

Rejoinder: that the several sums were not deducted by the defendant in the manner alleged, without this, that 135*l.* is due and owing over and above the said payments. The plaintiff, in his particulars of demand, gave credit to the defendant for payment of the rent due for the first of the two years, minus 16*l.* 6*s.* 2*d.*

At the trial before Lord *Denman* C. J., at the London sittings after Trinity term, 1838, the plaintiff proved that 106*l.* 16*s.* 6*d.* was due to him, after allowing the defendant all payments. On behalf of the defendant, the plaintiff's particulars of demand were put in evidence, and it was

contended that he was entitled to the verdict, as the payment pleaded of 135*l.* must be taken to apply to so much of the claim, as the particulars of the plaintiff did not admit to have been satisfied, and that such payment, which was admitted by the replication, exceeded the amount proved by the plaintiff to be due. His lordship reserved leave to move to enter a nonsuit, and directed a verdict for the plaintiff. Verdict for 106*l.* 16*s.* 2*d.*

Humfrey, in the following Michaelmas term (*a*), moved for a rule accordingly. The plaintiff was restrained by his particulars from disputing that part of his claim had been paid, and his replication admitted payment of the residue. [*Patteson* J. By the late rule (*b*), the particulars are part of the record, but they were not so previously.] They certainly were so for some purposes, "they are intended for the benefit and information of the defendant" (*c*), and the principal information which they furnish, is such a statement of the plaintiff's claim, that the defendant may know how to plead to it. They have also been deemed part of the record for all purposes. In *Kenyon* v. *Wakes* (*d*) it is observed, by *Parke* B., "Had that former point been raised, we should have had to consider a question which must soon be determined, viz. whether a payment admitted by the particulars must be pleaded. Had it not been for the decision of the Court of Common Pleas in *Ernest* v. *Brown* (*e*), I should have had little or no doubt on the subject. Before that case I entertained a strong opinion, and so expressed it in *Coates* v. *Stevens* (*f*), that such a payment need not be pleaded. I thought that the particulars were given to the defendant to enable him to know what to plead, as well as to restrain the plaintiff's proof of the claim in his declaration. In that view I agree with the decision of

(*a*) Nov. 5, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*b*) Trinity term, 1838, 3 N. & P. 381.

(*c*) *Booth* v. *Howard*, 5 Dowl. P. C. 441.

(*d*) 2 M. & W. 764.

(*e*) 4 Scott, 385.

(*f*) 2 C. M. & R. 118.

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Patteson J. in *Booth* v. *Howard* (*a*), that the particulars are for the benefit of the defendant." Suppose payment in this case had been denied by the replication, and proved at the trial, the defendant would be entitled to the verdict. *Nicholl* v. *Williams* (*b*) is not an authority against the defendant, for there the particulars were not used at the trial to restrain the plaintiff's claim.

Cur. adv. vult.

Lord DENMAN C. J. (after stating the pleadings) now delivered the judgment of the Court.—Mr. *Humfrey* moved to enter a nonsuit, upon the ground that the particulars of demand in this case give credit for the first of the two years' rent claimed in the declaration, less 16*l.* 16*s.* 2*d.*; that those particulars must be taken as part of the declaration, and the plea must be taken as pleaded to the balance, viz. 106*l.* 16*s.* 6*d.*; and that, as the replication admits the payment of 135*l.*, stated in the plea, which is a larger sum than that balance, the plaintiff by his own shewing is out of Court, and he cited *Booth* v. *Howard* (*a*), *Nicholl* v. *Williams* (*b*), and *Kenyon* v. *Wakes* (*c*), in support of these positions, and principally to shew that the particulars of the plaintiff's demand must be taken as part of the declaration, not only for purposes of evidence, but for purposes of pleading.

We do not think that those cases establish any such point, nor as at present advised are we prepared to agree with them if they did. But the point is not material to the decision of this case. For if it be conceded, for the sake of argument, that the declaration, as explained by the particulars, claims a balance of 106*l.* 16*s.* 6*d.*, and that the defendant has attempted to plead to that balance only, (which however it is plain he does not, since he pleads expressly as to 135*l.*, *parcel of the rent mentioned in the declaration*, thereby professing *that more than* 106*l.* 16*s.* 6*d.* is claimed by the declaration, and actually pleading to

(*a*) 5 Dowl. P. C. 441.
(*b*) 2 M. & W. 758.
(*c*) 2 M. & W. 764.

more,) yet the replication in terms stated that the payments attempted by the plea to be applied to that balance of 106*l.* 16*s.* 6*d.*, were applied to another and different demand, viz. to prior rent, and the rejoinder in substance takes issue on the very question of application, which has been found, and rightly found, for the plaintiff. In any view of the case, therefore, this verdict is right, and no rule for a nonsuit is to be granted.

Rule refused.

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Tuesday, Nov. 27th.

Assumpsit. Declaration for 883*l.* 16*s.*, stating that, although 664*l.* 3*s.* 6*d.*, parcel &c., had been paid, the remainder had not. Plea, payment of all sums of money in the declaration mentioned. The replication new assigned, that the action was brought not for 175*l.* 17*s.*, parcel of the monies in the declaration mentioned, but for another like sum, and denied payment of the residue. Pleas: 1, general plea of payment; and 2, denial that the cause of action new assigned was other and different, and issue thereon.—Held, that the plea to the declaration was not to be taken as pleaded to the balance only, and that the replication did not admit payment of 175*l.* 17*s.* as part of the balance, so as to entitle the defendant to a verdict on proof of payment of such a sum as, together with the 175*l.* 17*s.* admitted in the replication, was equal to such balance.

ASSUMPSIT. Declaration, that defendant was indebted to the plaintiffs in 883*l.* 16*s.* for goods sold and delivered, and on an account stated; that he afterwards promised to pay the said monies; and that, although defendant, in part performance of his said promise, had paid 664*l.* 3*s.* 6*d.*, parcel of the said sums of money, yet he had not paid the residue.

Plea. That defendant had paid to the plaintiffs divers sums of money, to wit, to the amount of all the monies in the declaration mentioned, in full satisfaction of all the rights of action in the declaration mentioned; which payments the plaintiffs accepted in full satisfaction.

Replication and new assignment. As to so much of the plea as related to part of the causes of action in the declaration mentioned, to wit, the sum of 175*l.* 17*s.* 0*d.*, that the plaintiffs brought their action not in respect of a certain part of the causes of action in the said plea mentioned, to wit, to the amount of 175*l.* 17*s.* 0*d.*, and in respect of which the defendant paid the said sum of 175*l.* 17*s.* 0*d.*, but for the non-performance of a promise to pay the plain-

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tiffs another and different sum, to wit, 175*l.* 17*s.* 0*d.* parcel of the monies in the said declaration mentioned; in which sum defendant was indebted to them for goods sold and delivered between the 1st day of June, 1836, and the 20th day of December, 1837; which promise in the declaration mentioned is another and different promise from the promise to pay the said sum of 175*l.* 17*s.* 0*d.*, so paid to the plaintiffs, and the cause of action in respect thereof. Verification, &c.

And as to so much of the said plea as relates to the residue of the causes of action in the declaration mentioned, other than the causes of action as to the said sum of 175*l.* 17*s.* 0*d.*, parcel of the monies in the declaration mentioned, the plaintiffs ought not to be barred &c., because the defendant did not pay the residue of the sums of money in the plea mentioned, other than the said sum of 175*l.* 17*s.* 0*d.*, parcel thereof &c.; concluding to the country.

Pleas to new assignment. That on the 1st day of December, 1832, and on divers other days between that day and the commencement of this suit, the defendant paid the plaintiffs divers sums of money, to wit, the amount of all the monies claimed by the new assignment, in full satisfaction of the cause of action newly assigned &c. Verification, &c.

And for a further plea to the cause of action newly assigned, that the promise in the declaration mentioned as to the said sum of 175*l.* 17*s.* 0*d.*, parcel &c., is not a different promise and cause of action from the said promise to pay the said sum of 175*l.* 17*s.* 0*d.*, so paid to the plaintiffs, and the cause of action in respect thereof; concluding to the country.

The replication traversed the first plea, on which issue was joined, and joined issue on the second plea.

The plaintiffs' particulars of demand were the same, both under the declaration and the new assignment, commencing in June 1836, and ending in September 1837. Credit was given for payments to the amount of 664*l.* 3*s.* 6*d.*,

many of which were made in 1836, and the balance claimed was 219*l.* 12*s.* 6*d.*

At the trial before *Patteson* J., at the Kent Summer assizes, 1838, it appeared that a long course of dealing had taken place between the parties on the footing of principal and agent, but that the relation of vendor and purchaser did not commence till 1837, when a contract for the sale of oysters was entered into between the parties; that the amount of oysters sold in that year came to 370*l.* 16*s.* 6*d.*, and the amount of payments to 312*l.* 15*s.* 0*d.*, leaving a balance of 58*l.* 1*s.* 6*d.* in favour of the plaintiffs. It was then contended for the defendant that the plaintiffs ought to be nonsuited, inasmuch as the defendant's plea of payment applied to the balance of 219*l.* 12*s.* 6*d.* claimed in the declaration, and that, as the new assignment admitted payment to the amount of 175*l.* 17*s.* 0*d.*, the payment admitted, together with that proved at the trial, came to a much larger sum than was necessary. The learned Judge reserved leave to the defendant to move for a nonsuit, or to enter a verdict for the defendant, but directed a verdict for the plaintiffs for 58*l.* 1*s.* 6*d.* Verdict for the plaintiffs.

Ogle, in Michaelmas term, moved for a rule accordingly. The defendant is entitled to the verdict. If the plaintiff relied on the declaration, which claimed a balance of 219*l.* 2*s.* 6*d.*, he was defeated by proof of payment to a much larger amount; and if he relied on the new assignment only, his difficulty was still greater, as he thereby claimed 175*l.* 17*s.* only. By the new assignment he, in fact, admitted that the whole claim in the declaration had been satisfied, and undertook to prove that something more was due, which was not recoverable under the declaration; *Hall* v. *Middleton* (*a*). If he merely meant that the defendant had not paid all that was due, no new assignment was necessary; *Freeman* v. *Crafts* (*b*). One of the issues on the new assignment was, whether it disclosed a different cause of action, and the plaintiff should have proved the affirma-

(*a*) 4 A. & E. 107; *S. C.* 5 N. & M. 410. (*b*) 4 M. & W. 4.

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tive. Otherwise, where *A.* owes *B.* 100*l.*, which has been paid, *B.* has only to declare for 1000*l.*, admitting payment of 100*l.*, and, after plea of payment, to new assign for another 100*l.*, and he will succeed on proof of a single cause of action to the amount of 100*l.*

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—The pleadings in this case are somewhat confused, and have given rise to a question, whether the plaintiff is not, on the true construction of them, out of Court. The declaration is for goods sold and delivered to the amount of 883*l.* 16*s.*, and states that although 664*l.* 3*s.* 6*d.* has been paid, the remainder has not; it claims, therefore, 219*l.* 12*s.* 6*d.* The second plea pleads generally payment of *all sums of money mentioned in the declaration.* The replication as to 175*l.* 17*s.*, part of the monies mentioned in the first count, states by way of new assignment that the plaintiff sued out his writ not for the causes of action in respect of which that sum of 175*l.* 17*s.* was paid, but for a like sum on other and different promises; viz. for goods sold and delivered between the 1st of June, 1836, and the 20th of December, 1837; and as to the rest of the monies alleged to be paid denies the payment. To the last assignment the defendant pleads, 1, a general plea of payment; 2, that the causes of action as to the 175*l.* 17*s.* are not other and different. Upon those pleas issue is joined. At the trial it was proved distinctly that the causes were other and different, and that on the whole accounts a balance of 58*l.* 1*s.* 6*d.* was due, for which the verdict was taken. Mr. *Ogle* moved for a nonsuit, contending, as he did at the trial, that as the declaration claims a balance of 219*l.* 12*s.* 6*d.* only, the first plea of payment must be taken as pleaded to that balance only; that the replication by way of new assignment having admitted the payment of 175*l.* 17*s.*, as alleged in the plea, it was sufficient for the defendant to prove payments making up the difference between 219*l.* 12*s.* 6*d.* and 175*l.* 17*s.*, and that, he having done so, the plaintiff was out of Court. We think that

the view so taken of the pleading is wrong in two respects. 1st, The plea of payment is not confined to the balance claimed in the declaration; it is pleaded in terms that the defendant has paid all the sums of *money mentioned in the declaration*; and there is nothing to prevent our giving the words their natural meaning, which is, that the defendant has paid not only the sums *admitted* by the declaration, but also all other sums mentioned in it. 2dly, The replication does not admit the payment of 175*l.* 17*s.*, as stated in the plea; that is to say, as made in respect of the balance claimed; although it does admit it was made in respect of causes of action *mentioned in the declaration*; for it expressly states that the plaintiff brought his action *not* for the causes of action in respect of which that admitted sum of 175*l.* 17*s.* *was paid*, but for other and different causes within a specified period of time, which in effect amounts to this, that the sum of 175*l.* 17*s.* is part of the money admitted in the declaration, and the action is brought for the balance in respect of other and different causes of action. The defendant has denied that the causes of action were other and different, and that has been found against him. Whether the plaintiff might or might not have stated the first plea of payment as applicable to the balance only, and have replied by denying *any* payment beyond that admitted in the declaration, is not now the question. It is plain that the words of the plea are not necessarily so limited, and the plaintiff was not bound to consider them as so limited. Neither is it more necessary to inquire why the particular sum of 175*l.* 17*s.* was mentioned in the replication, the reason for which does not appear. The substance of the issue is, whether the defendant has paid *all* that is due; and that issue having been tried, no ground is shewn to us sufficient to disturb the verdict. No rule is to be granted. It is highly satisfactory to us to find a similar view taken of this point by the Court of Exchequer in *Freeman* v. *Crafts* (*a*). Rule refused.

(*a*) 4 M. & W. 4.

1838.

HEYWOOD *v.* COLLINGE.

Wednesday, Nov. 28th.

Declaration, that the defendant had arrested the plaintiff, and that the plaintiff had been detained in custody until he was discharged by reason of the defendant's not having declared against him; that the defendant might have procured judgment in that suit, if he had thought fit, but that he afterwards, without any reasonable or probable cause, *maliciously* arrested him a second time for the same cause of action, without the leave of any Judge of the Court of Exchequer, or of the King's Bench. Plea, the pendency of the former suit.—Held, on demurrer to the plea (Lord *Denman* C.J. *dubitante*) that the declaration was good, as it must be taken that the second arrest was maliciously made by the defendant, without the contemplation of any benefit to himself.

Quære, Would the declaration have been good on special demurrer?

CASE. The declaration stated, that on the 1st day of December, 1830, the defendant sued out of the Court of Exchequer a writ of quo minus, directed to the sheriff of Cheshire, against one *John Whyht* and the plaintiff, indorsed for bail for 244*l.* 7*s.* 7*d.*, upon which the latter was arrested and kept in prison until the 18th day of November, 1835, when he was discharged out of custody by reason of the defendant not having declared against him; that the plaintiff could and might have procured a judgment in that suit if he had thought fit; and that, at the time of committing the grievances, the said suit was still pending. That the defendant, intending to harrass the plaintiff, and to cause him to be arrested again for the sum of 230*l.*, parcel of the said sum for which he had already been arrested, and without the leave of the Court of Exchequer, or of any Judge or Baron thereof, or of the Court of King's Bench, or of any Judge thereof, and, *without any reasonable or probable cause, maliciously* sued out of the Court of King's Bench a writ of capias ad respondendum, directed to the sheriff of Cheshire, against the plaintiff, which he maliciously caused to be indorsed for bail for 230*l.*, parcel of the former sum of 244*l.* 7*s.* 7*d.*, for which he had been before arrested; upon which said writ of capias the plaintiff, being then in the custody of the said sheriff, was detained until he was discharged by the order of *Patteson* J. To the damage &c.

Plea: That the said writ of capias had not been set aside, and that the plaintiff had declared thereon; and that the said last-mentioned suit was pending in the Court of King's Bench at the commencement of this action. Demurrer and joinder.

R. V. Richards, in support of the demurrer. The pendency of the former suit between these parties is immaterial,

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for the present is not an ordinary action for malicious arrest, where the determination of the suit in which the arrest was made is indispensable, for the purpose of proving such arrest to have been malicious. But here the plaintiff admits that the defendant had a cause of action, and that the first arrest was justifiable, and complains that he was maliciously arrested a *second* time for the same cause of action. [Lord *Denman* C. J. Is it admitted that there was a cause of action?] It is not denied. In *Scheibel* v. *Fairbain* (*a*), where it was held that no action would lie for not countermanding a writ of capias, after payment of the debt, the declaration contained no averment of malice: and on the same ground judgment was arrested on the third count of the declaration in *Page* v. *Wiple* (*b*). In neither of those cases was it denied that there was a cause of action, and the averment of malice, which was all that was wanting in them, is supplied here. The present plaintiff complains, in fact, of a malicious abuse of the process of the Court in unnecessarily bringing a second action, although judgment might have been obtained in the first. In *Grainger* v. *Hill* (*c*) the very point was decided that, in an action for abusing the process of the Court, it is not necessary to prove that the action in which such process was improperly employed has been determined. Suppose a creditor vindictively arrest his debtor once a term for the same claim, how is compensation for the wrong to be obtained except by this form of action? For if a debt really be due, the original action could never terminate in favour of the party injured. Case will lie against a party for maliciously refusing to accept from a defendant in execution the debt and costs, and to sign an authority for his discharge; *Crozer* v. *Pilling* (*d*). The declaration certainly omits to negative that an order for the second arrest had been made by a Judge of the Common Pleas; but that omission cannot be taken advantage of on general demurrer. Indeed it would not vary the case if a

(*a*) 1 B. & P. 388.
(*b*) 3 East, 314.
(*c*) 4 Bing. N. C. 212.
(*d*) 4 B. & C. 26; *S. C.* 6 D. & R. 129.

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Judge's order had been obtained, as the second arrest is distinctly averred to have been malicious, and the order itself might have been procured by malice.

W. H. Watson, contrà. It is difficult to understand from this declaration whether the plaintiff complains of a malicious arrest, or of a second arrest without a Judge's order. It has been assumed that a cause of action in the former suit is admitted, but that does not appear. If this is to be treated as an action for a malicious arrest, it comes within the general rule that, in all cases of action for malicious arrest or prosecution, it must be alleged that the former proceedings have been determined in favour of the plaintiff; *Com. Dig.* Action on the Case for Conspiracy (C 5); and their pendency is a good defence. In *Scheibel* v. *Fairbain* (*a*) and *Crozer* v. *Pilling* (*b*) the debt and costs had been paid. If the second arrest, without a Judge's order, is the gist of the complaint, the declaration cannot be maintained. There are many cases where no such order is necessary to a second arrest; *Cantellow* v. *Freeman* (*c*) and *Olmius* v. *Delaney* (*d*). It is merely by the practice of the Courts, which takes its origin from a rule of Mich. term, 15 *Car.* 2 (*e*), that a person cannot be arrested a second time for the same cause of action. The declaration does not itself state that the second arrest was made under such circumstances as that a Judge's order would be necessary, and omits to negative that an order was made by a Judge of the Court of Common Pleas. No action can be maintained for arresting, contrary to the practice of the Court, a married woman, certificated bankrupt, or other privileged person. The mere violation of a rule of practice is not a ground of action. Suppose, independently of all practice, several actions to be commenced maliciously for the same cause, for the purpose of harrassing a party, the penalty would be the

(*a*) 1 B. & P. 388.
(*b*) 4 B. & C. 26; *S. C.* 6 D. & R. 129.
(*c*) 1 C. & M. 536.
(*d*) 2 Str. 1216.
(*e*) 1 Tidd, 175, 9th ed.

payment of costs in all the other actions brought during the pendency of the first. There is not in this case, as in *Grainger* v. *Hill* (*a*), any abuse of the process of the Court. *Cameron* v. *Lightfoot* (*b*), and *Stokes* v. *White* (*c*), were attempts to sustain actions very like the present, but were unsuccessful.

R. V. Richards, in reply. Where the process against a party is regular, as in this case, he cannot obtain his discharge by application to the Court, merely because the party arresting him has been influenced by vindictive motives; his only remedy is by this form of action. The costs which are paid to a defendant unnecessarily harrassed by several actions are merely for the purpose of reimbursing him his expenses, but afford no compensation for the deprivation of his liberty. In *Stokes* v. *White* (*c*) a new trial was granted because the Court thought the defendant was not shewn to have been actuated by malice; and *Cameron* v. *Lightfoot* (*b*) was simply an arrest of a privileged person, without any allegation of malice.

Lord DENMAN C. J. (after stating the pleadings.)—The plea treats this case as if it were an ordinary case of malicious arrest, and, if it had been, the plea would have been unnecessary, as the declaration would itself have been bad for not averring that the former proceedings had been determined. But the plaintiff does not complain, as supposed, of a mere malicious arrest, but of an abuse of the process of the Court, by which he has been unnecessarily and maliciously arrested a second time, although judgment might have been obtained in the former action. I have some doubt on this case, and I am certainly unwilling to say that this action can be sustained, both on account of its novelty and because it does not appear that the defendant, by the second

(*a*) 4 Bing. N. C. 212.
(*b*) 2 W. Bl. 1190.
(*c*) 1 C. M. & R. 223.

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arrest, inflicted any actual injury on the plaintiff. The allegation of malice, however, is very material. The allegation is general, and it should, perhaps, have stated that the defendant made the second arrest without contemplating any benefit to himself, and solely to oppress and injure the plaintiff. If then a more detailed statement of the defendant's malicious conduct would have been sufficient, we think that this declaration should have been specially objected to, and that it is good on general demurrer.

PATTESON J.—I do not think that this action is brought for a violation of the practice of the Court; if it had been, I should say that it clearly could not be sustained. I am satisfied that this declaration is good on general demurrer.

WILLIAMS J. concurred.

COLERIDGE J.—This declaration must be looked at as if objected to on general demurrer; and if we hold that it discloses no cause of action, we must be prepared to say that a party may maliciously use the process of the Court for the sole purpose of harrassing another. It is no answer to say that this action is quite of a novel character. I am satisfied that, on general principles of law, it may be maintained.

Judgment for the plaintiff.

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BARTRUM, Public Officer &c., *v.* CADDY.

Thursday, Nov. 29th.

ASSUMPSIT on a promissory note. The plaintiff declared as registered public officer of the National Provincial Bank, on a joint and several promissory note made by *John Hatherley* and *John Hamlyn*, the 26th June, 1833, for 200*l.*, payable on demand, and indorsed by them to the defendant, and by the defendant indorsed to the said National Bank.

Pleas: 1. That at the time of making the said promissory note the said *J. Hatherley* and *J. Hamlyn* were jointly indebted to one *Richard Bartlett* in the sum of 200*l.*, who then requested the said *Hatherley* and *Hamlyn* to furnish him with some security for the said debt; and thereupon the said *Hatherley* and *Hamlyn* requested the defendant to indorse, for their accommodation, a promissory note to be drawn by them, in order that they might deposit the same with the said *R. Bartlett*, by way of security for the said debt so due and owing by them to the said *R. Bartlett;* that the defendant consented to indorse such note; and that thereupon the said *J. Hatherley* and *J. Hamlyn* made their note in the declaration mentioned, and the defendant indorsed the same in blank and delivered it to the said *J. Hatherley* and *J. Hamlyn* for the purpose aforesaid, and for no other intent or purpose whatsoever. And the defendant says, that the said *J. Hatherley* and *J. Hamlyn* did then deliver the said promissory note to the said *R. Bartlett*, by way of security for the said debt so due to him as aforesaid, who then had and received the same as such security aforesaid. And the defendant further says, that afterwards, to wit, on the 1st July, 1833, the said *John Hatherley* and *John Hamlyn* paid to the said *R. Bartlett* the said debt so due to him from them as aforesaid, and the said *R. Bartlett* then

Where a note payable on demand has been indorsed for the accommodation of the maker, in order to be deposited with his creditor, to secure the debt due, if the maker of the note pays the debt, and the bill is re-delivered to him, it is no longer negotiable. Where therefore *J. H.* and *H.* being indebted to *B.* in 200*l.*, *B.* demanded security for the debt; *J. H.* and *H.* thereupon requested the defendant to indorse, for their accommodation a promissory note to be drawn by them in order to deposit the same with *B.* by way of security for their debt. The defendant accordingly indorsed a note so drawn for 200*l.* for that purpose, and for no other

intent whatsoever, and *J. H.* and *H.* delivered it to *B.*, and afterwards paid *B.* his debt, who thereupon re-delivered the note to them. The defendant being subsequently sued by a bonâ fide indorsee, to whom the note had been indorsed by *J. H.* alone:—Held, on general demurrer, that a plea setting out the above facts shewed that the note had been satisfied, and that having got back into the hands of the parties ultimately liable, it was no longer issuable, under the Stamp Act, 55 *Geo.* 3, c. 184, s. 19.

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re-delivered the said promissory note to the said *J. Hatherley* and *J. Hamlyn*. And the defendant further says, that the said *J. Hamlyn* afterwards, and more than two years from the date of the said promissory note, to wit, on the 1st of January, 1836, delivered the said note to the said National Provincial Bank, to secure to the said bank a certain debt then due from the said *J. Hamlyn* alone to the said bank, without any authority from the defendant in that behalf. Verification.

The second plea, after stating the facts as set out in the first plea, averred, that after the re-delivery of the note by *Bartlett* to *J. Hamlyn*, the said *J. Hatherley* and *J. Hamlyn* never had, nor had either of them, any authority from the defendant to negotiate the said note; yet the said *J. Hamlyn* afterwards, and more than two years from the date of the said note, to wit, on &c., wrongfully and in fraud of the said defendant, delivered the said note to the said bank as a security for a certain debt then due and owing from him to the said Bank.

Averment, that the said Bank having received the note, as they did, from *J. Hamlyn*, one of the makers of the note, on his own private account, and at a period so long after the date of the note, acted negligently, and did not use due and ordinary caution in so taking the said promissory note. General demurrer to the pleas; and joinder in demurrer.

The marginal note stated, as the ground of demurrer, that the misconduct of *Hatherley* and *Hamlyn* respecting the note did not deprive the plaintiff of his right to sue, he being a bonâ fide holder for value without notice.

Crowder, in support of the demurrer. The first plea is not an answer to the action. The facts alleged on the face of that plea by way of defence, are not brought home to the knowledge of the plaintiff; therefore, supposing the note to have been indorsed fraudulently by *Hamlyn*, as the plaintiff is a bonâ fide holder, he is not affected by the

fraud without notice. The defendant having lent his name to the note, although only for accommodation, is liable upon it to a bonâ fide holder, whatever fraud may have been committed with respect to it; *Peacock* v. *Rhodes* (*a*), *Collins* v. *Martin* (*b*), *Anonymous* (*c*), *Miller* v. *Race* (*d*), *Ex parte Pease* (*e*). The law on this subject is clearly laid down in *Solomons* v. *Bank of England* (*f*), which establishes that it is only privity to the fraud on the part of a holder to a bill that can prevent him from recovering. No circumstance is stated in the plea to relieve the defendant's general liability; for, although it is averred that the bill was given up to *Hatherley* and *Hamlyn* by the holder, and was indorsed by *Hamlyn* for his own private debt, after it was due, to the plaintiff, that fact does not shew any fraud on the part of the plaintiff, and could only have been put to the jury as a circumstance tending to shew that the plaintiff was privy to the fraud; *Adams* v. *Bingley* (*g*). It is also alleged that the note was given as a security for the debt of *Bartlett;* but that is immaterial, for it cannot be contended that the plea contains an averment that the note was paid. *Foster* v. *Pearson* (*h*) shews distinctly that, although bills may be deposited as a security only, a bonâ fide holder may recover upon them (*i*).

(*a*) 2 Doug. 633.
(*b*) 1 B. & P. 648.
(*c*) 1 Salk. 126.
(*d*) 1 Burr. 452.
(*e*) 1 Rose, 232.
(*f*) 13 East, 135, n.
(*g*) 1 M. & W. 192.
(*h*) 1 C. M. & R. 849.
(*i*) *Crowder* objected to the second plea, on the ground that the doctrine laid down in *Gill* v. *Cubitt*, 5 D. & R. 324; S.C. 3 B. & C. 466; and followed up by the decisions in *Slater* v. *West*, Danson & Lloyd, 15; *Snow* v. *Peacock*, 3 Bing. 406; *Strange* v. *Wigney*, 6 Bingh. 677; *Lang* v. *Smyth*, 7 Bing. 284; *Easley* v. *Crockford*, 10 Bing. 248; *Down* v. *Halling*, 4 B. & C. 330; S.C. 6 D. & R. 455; *Rothschild* v. *Corney*, 9 B. & C. 388, could not be supported; and that the late decisions of the Court in *Crook* v. *Jadis*, 5 B. & Ad. 909; *Backhouse* v. *Harrison*, 5 B. & Ad. 1098; and *Goodman* v. *Harvey*, 4 Ad. & E. 870; had shewn a disposition to recur to the old law in *Lawson* v. *Weston*, 4 Esp. 56. As the judgment of the Court was not given upon this point, the argument is omitted.

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Erle, contrà. The note in question, at the time it was indorsed to the plaintiff, was a paid bill, and therefore was incapable of being re-issued. The contract on which the note was given was as follows: *Hatherley* and *Hamlyn* being indebted to *Bartlett*, he demands security for his debt; whereupon the former persuade the defendant to put his name to a promissory note as a security for their debt. The promise of the defendant, therefore, was as a surety only, and it was in respect of the debt due to *Bartlett*: as soon, therefore, as *Bartlett*'s debt was discharged, the note given as security for it became satisfied. This clearly appears from *Freakley* v. *Fox* (*a*), in which case the payee and holder of a promissory note had appointed the maker of it his executor; and it was held that by so doing the testator had discharged the debt, and that therefore no action could be maintained on the note, even by a bonâ fide holder, to whom the executor had indorsed it after the death of the testator. Several other cases may be cited in illustration of the same principle; *Brown* v. *Davies* (*b*), *Beck* v. *Robley* (*c*), *Thorogood* v. *Clarke* (*d*), *Gomez Serra* v. *Bulkeley* (*e*), *Callow* v. *Lawrence* (*f*), *Burbridge* v. *Manners* (*g*); and the words of the Stamp Act, 55 *Geo.* 3, c. 184, s. 19, are decisive on this point: "that all promissory notes (not hereby allowed to be re-issued) shall, upon any payment thereof, be deemed to be thereupon wholly discharged, and shall be no longer negotiable."

Crowder, in reply. If the plea had intended to aver that the note had been satisfied and discharged, a very simple allegation would have sufficed; but no such allegation is to be found. It is true that the jury might have found the fact, as an inference from the statements in the plea, but that inference cannot be drawn by the Court. In all the

(*a*) 9 B. & C. 130; *S. C.* 4 M. & R. 18.
(*b*) 3 T. R. 80.
(*c*) 1 H. Bl. 89 a.
(*d*) 2 Stark. N. P. C. 251.
(*e*) 1 Wils. 46.
(*f*) 3 M. & S. 95.
(*g*) 3 Camp. 194.

cases, cited to shew that a note cannot be re-issued, the fact of the bill having been paid was established. [*Williams* J. It is quite clear that *Hamlyn* got the bill on payment of the debt to *Bartlett*. How can you distinguish this from a case of goods sold, and a bill given in payment? If the goods are paid for in cash, the bill must be thereby discharged.] That would be so if the bill were in the hands of the vendor; but suppose the bill to be negotiated by him before payment, the payment in cash to the vendor would be no answer to the bonâ fide holder. If a party puts his name to a negotiable instrument, and then chooses to pay the debt for which the bill was given, without demanding it to be re-delivered to him, he must take the consequences of his laches. Suppose *Bartlett* had indorsed the note before he received payment, and that it had come into the hands of *Hamlyn* for a debt of his own, it then would not have been in the hands of *Hatherley* and *Hamlyn*. [*Patteson* J. That might explain the fact of the plaintiff taking the note from *Hamlyn*, although one of the makers of the note, but it does not meet the point of the bill having been actually paid. It is distinctly averred here, that the debt for which the note was given was discharged by the parties previously liable; the note was therefore no longer in circulation.] *Roberts* v. *Eden* (*a*) would seem to shew that is not so. *Eden* had there made his promissory note payable on demand, which he deposited with one *Hunt* as a security for money borrowed, and *Hunt* indorsed it over to the plaintiff for the same purpose. *Hunt* and *Eden* subsequently settled accounts, and the balance was paid, but the note in question was not asked for or delivered up. On the plaintiff suing *Eden* it was not attempted to be set up, that, by the settlement of the balance, for which the note was given, the note itself was discharged, but the case was decided, on the ground of the plaintiff having received the note from *Hunt* subject to all its equities. In *Freakley* v. *Fox* (*b*) the decision proceeded on the peculiar

(*a*) 1 B. & P. 398. (*b*) 9 B. & C. 130; *S. C.* 4 M. & R. 18.

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principle of law, which attaches where a testator appoints a debtor his executor.

Lord DENMAN C.J.—We are quite satisfied that the facts in the first plea sufficiently shew that the promissory note indorsed by the defendant was satisfied and discharged, and I do not see how this point is to be got over. Although, therefore, it appears that the intention of the parties was to bring the doctrine in *Gill* v. *Cubitt* (*a*) under review, which certainly has been more than questioned in subsequent cases, and upon which the Court will not hesitate to give its opinion, when it comes properly before them, yet considering the high authority by which that case was decided, we shall not go out of our way to notice it. For it is quite clear, from the facts alleged in the first plea, that the note indorsed by the defendant was given to secure the debt due to *Bartlett*, and for that only, and that that debt had been paid; the note, therefore, was satisfied, and the Stamp Act applied to prevent its further negotiability. *Freakley* v. *Fox* (*b*) is an authority to shew that, when the debt is discharged, the bill or note given in respect of the debt falls to the ground likewise; for, although the decision of the Court turned upon another point, this position must have been assumed by the Court in giving judgment upon the point before them.

PATTESON J.—The argument raised on the note being given as a security does not appear applicable to the existing state of facts, though perhaps it might be if it were given to secure an open balance. But here the note was indorsed by the defendant to secure the specific debt of *Hatherley* and *Hamlyn*, "and for no other intent or purpose whatsoever." That being so, the plea presents to my mind a distinct averment that the note was satisfied; for it shews that the debt was paid and the note re-delivered to

(*a*) 3 B. & C. 466; *S.C.* 5 D. & R. 324.

(*b*) 9 B. & C. 130; *S.C.* 4 M. & R. 18.

Hatherley and *Hamlyn*. It is therefore immaterial to consider whether *Hamlyn* indorsed the note for a debt of his own or not; the note must have got out of the hands of *Hatherley* and *Hamlyn* somehow or other, and, in whatever way, improperly, for they had no right to re-issue the note. *Freakley* v. *Fox* (*a*) assumes that to be the law; for as the plaintiff there was a bonâ fide indorsee of the note, it was only upon the ground of the note having lost its negotiability, by coming back to the hands of the party ultimately liable, that the plaintiff was held to be not entitled to recover. *Thorogood* v. *Clarke* (*b*) is also directly in point for the defendant; whereas the case cited for the plaintiff, *Roberts* v. *Eden* (*c*), is not in point, for there the bill had never come to the hands of *Eden*, who was the maker of the note. It is true that accounts were settled between the parties, but no notice appears to have been taken of the bill in question; and at the time of the settlement the bill was outstanding in the hands of an indorsee. Here the note got back to the hands of the party ultimately liable, and he had no right to re-issue it.

WILLIAMS J.—The whole argument for the plaintiff seems to depend on this, whether it should be stated in so many words that the bill had actually been paid. But the objection is raised on general demurrer, and I think therefore that it is impossible to say that the plea does not contain a substantial averment of the note having been satisfied. The 55 *Geo.* 3, c. 184, is therefore conclusive.

COLERIDGE J.—The only question for the Court is, whether either of the pleas discloses that the note which bears the defendant's indorsement has been satisfied: that is a matter of fact, and I think there is a very distinct allegation of it in the pleas. It is true that the note in ques-

(*a*) 9 B. & C. 130; *S. C.* 4 M. & R. 18.

(*b*) 2 Stark. N. P. C. 251.

(*c*) 1 B. & P. 398.

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tion was given as security for an antecedent debt, and was not given in payment; but the debt has been paid, and the note given up to the parties ultimately liable on it: therefore there has been payment of the note. The fact, then, of want of notice to the plaintiff of these circumstances is immaterial, for the statute says that such a note shall not be re-issued.

Judgment for the defendant.

Thursday, Nov. 29th.

GOMPERTZ *v.* LEVY.

The following publication was held to be no libel: "Notice. Any person giving information where any property may be found belonging to *H. G.*, a prisoner in the King's Bench prison, but residing within the rules thereof, at 3, 4, and 5, Portland Place, Borough Road, shall receive 5 per cent. upon the goods recovered, for their trouble, by applying to Mr. *Levy*, Fetter Lane, Fleet Street;"— Held, that the following innuendo, "thereby meaning that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention;" was an addition, and not explanatory only of any previous matter alleged in the notice.

LIBEL. The declaration stated, after an averment of the plaintiff's good character, that the defendant, intending to injure the plaintiff, and cause it to be believed that he had been guilty of misconduct, maliciously published the following libel of and concerning the plaintiff:—"Notice. Any person giving information where any property may be found belonging to *Henry Gompertz*, a prisoner in the King's Bench Prison, but residing within the rules thereof, at 3, 4, and 5, Portland Place, Borough Road, shall receive 5 per cent. upon the goods recovered for their trouble, by applying to Mr. *Levy*, Fetter Lane, Fleet Street." Thereby meaning that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention, whereby the plaintiff was damnified.

Demurrer to the replication, which it is not necessary to notice, as

Hoggins, who appeared for the defendant, objected to the declaration, on the ground of the statement not being libellous, as the notice might have been given with the

privity of the plaintiff; and he relied on *Stockley* v. *Clement* (*a*).

Ball, contrà. In *Stockley* v. *Clement* (*a*) there was no innuendo. Here it is expressly stated that the defendant intended to charge the plaintiff with fraudulently concealing his property. That was matter of evidence for a jury. Besides, it is libellous to charge a man with being confined in the King's Bench Prison, in the same way as it is libellous to say of a person in trade that he is bankrupt. *Brown* v. *Croome* (*b*) shews that advertising in this manner in a newspaper is libellous.

Lord DENMAN C. J.—It is not necessary to decide that a notice like the present may not be a libel. Circumstances may exist in which the publication of such a statement would be highly libellous; but then there should be an introductory averment to shew what those circumstances are.

PATTESON J.—The law as to the necessity for an introductory averment, where the words are ambiguous, is very clearly laid down in *Goldstein* v. *Foss* (in error) (*c*), namely, that "an innuendo cannot add a fact, or enlarge the natural meaning of words." But no one can say that this innuendo does not enlarge the meaning of the terms used. The declaration contains no introductory averment, and the words in the libel are of themselves quite innocent: the innuendo therefore is just within the rule laid down in *Goldstein* v. *Foss* (*c*).

WILLIAMS J.—The office of an innuendo is clearly explained in *Rex* v. *Horne* (*d*), and in the notes to *Craft* v. *Boite* (*e*), where the cases are collected. It can never do more than explain preceding matter. If it adds any thing, it

(*a*) 4 Bing. 162.
(*b*) 2 Stark. N. P. C. 297.
(*c*) 4 Bing. 489.
(*d*) Cowp. 684.
(*e*) 1 Wms. Saund. 243, n. (4).

8. ERTZ v. IVY.

is bad; as in the familiar case of a libel for the words "he has burnt my barn," an innuendo that he thereby meant "his barn full of corn" is bad (*a*).

COLERIDGE J.—Mr. *Ball* is driven to contend that these words, stating the plaintiff to be a prisoner in the King's Bench Prison, are libellous of themselves. But I deny that. They only shew that a party has the misfortune to be poor. I quite agree with the rest of the Court.

Judgment for the defendant (*b*).

(*a*) *Barham* v. *Nethersall*, 4 Rep. 20 a.

(*b*) See *Wheeler* v. *Haynes*, *ante*, 55.

Saturday, December 1st.

SHIPTON *v.* THORNTON.

1. The freighter of goods on which freight was to be paid on delivery at the port of destination, is bound to pay the whole freight originally contracted for, where transhipment has been found necessary and the goods have been delivered at the port of destination, although the master of the ship consigned the goods under fresh bills of lading in the second vessel to his own agent, and the freight was at a much lower rate than the originally contracted for.

Semble, also, that if the freight in the second vessel exceeded that contracted for in the original bill of lading, the freighter would be liable for the additional freight also.

2. A cargo of goods, part of which belonged to *T.* separately, and part to *T.* & *W.* as partners, being in the hands of the consignee, *T.*, on application for both parcels signed an undertaking in the name of *T.* & *W.* to pay freight for them, but commencing with "I hereby engage to pay;" and the goods were delivered to him. On an action against *T.* for the freight on his own parcel, the agreement was produced, with a sufficient stamp impressed, and held admissible, because although the agreement related to the goods of the partnership as well as his own, he could not bind his partner as to the latter, but had made himself personally liable for the whole, and therefore the agreement was entire.

3. Where a witness stated on the voire dire that "he had as agent employed original attorney for the plaintiff; that the attorney was dead; that he was released; that no demand had been made upon him; and that he did not state the attorney was to look to the plaintiff, and not to himself;" and nothing further appeared to shew that the witness had an interest in the suit, or had made himself liable to the new attorney:—Held, that he was competent.

ASSUMPSIT. The declaration (before the New Rules) contained several special counts, which it is not necessary to mention. It also contained a general count for freight "in respect of certain goods and merchandize, by the plain-

tiff before that time carried and conveyed in and on board of certain ships, &c. from Sincapore to London, and there, at London aforesaid, delivered to the defendant.

Plea: non assumpsit.

The following particular of demands was delivered:— This action is brought to recover the sum of 582*l.* 17*s.* 11*d.*, being the difference in the amount of freight between the Mountaineer and Sesostris and the James Scott; that is to say, 496*l.* 5*s.* 9*d.*, part thereof, in respect of the Mountaineer, and 86*l.* 12*s.* 2*d.*, residue thereof, in respect of the Sesostris, and which the said defendant became liable to pay to the plaintiff, by virtue of his promise or undertaking of the 6th January, 1827, given to *William Ellwand* as the agent of the said plaintiff; and which difference of amount of freight arose in consequence of certain goods and merchandizes, particularly described in the said declaration in this cause, having been consigned to the said defendant, and which were shipped on board the James Scott, of which plaintiff was master and owner, to be carried on freight from Sincapore, in the East Indies, to London, having been transhipped, and sent home from the said James Scott into and by certain other vessels, called the Mountaineer and Sesostris, in consequence of the James Scott having been damaged at sea, and obliged to proceed to Batavia, in the island of Java, for the purpose of repair. The nature of the plaintiff's claim is fully detailed in the first and second counts of the declaration in this cause; and for the recovery of which he will avail himself of all or such of the counts in the declaration as may, upon the trial, be found most applicable thereto.

At the trial before *Coleridge* J., at the sittings after Trinity term, 1836, in London, the following facts appeared. In January, 1836, the agent of the defendant shipped at Sincapore, on board the James Scott, belonging to the plaintiff, certain goods under a bill of lading, by which it was stipulated that the "goods were to be delivered at the port of London, to *Richard Thornton*, Esq., or his assigns,

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he or they paying freight for the said goods, as per margin;" and he also shipped other goods for the firm of *Thornton* and *West*. The James Scott proceeded on her voyage with a general cargo, but encountering severe gales, was obliged to put into Batavia, and on her arrival there, in consequence of the damage to the ship and cargo, a transhipment was found necessary, and the cargo, including the goods of the plaintiff, was transhipped to the Mountaineer and Sesostris, and bills of lading were drawn for delivery of the cargoes to *William Ellwand*, Esq., or his assigns, he or they paying freight. On the arrival of the last-mentioned vessels with their cargoes in London, the defendant claimed both parcels of goods under the bill of lading per James Scott, but contended that he was only bound to pay freight pro ratâ from Sincapore to Batavia, and the actual freight per Mountaineer and Sesostris. Mr. *Ellwand*, the plaintiff's agent, refused to deliver the goods except on payment of the whole freight stipulated for in the original bill of ading per James Scott, the freight in the Mountaineer and Sesostris being at a lower rate. The defendant, it was stated by Mr. *Ellwand*, agreed to pay this difference, and as the amount was not then ascertained, gave him the following undertaking:—

"London, 14th Oct. 1827.

"D^r Sir.—I hereby undertake to pay you the difference in amount of freight between the Mountaineer and the James Scott, when the same shall have been ascertained.

I am, d^r Sir, your ob^t serv^t,

R. & R. Thornton & West."

And the goods were delivered to him.

This agreement was impressed with a single 1*l.* agreement stamp. Mr. *Ellwand*, who was the principal witness for the plaintiff, being examined on the voire dire, said, "I employed Mr. *Edis*, the attorney, who commenced this action, as plaintiff's agent. He has been dead some time. There is a new attorney. I have not been released. No demand has been made on me. I did not state to him

he was to look to plaintiff, and not to me." It was objected on this evidence that the witness had rendered himself liable for the costs of the action, and that he was therefore incompetent. The learned judge overruled the objection, but reserved the point.

It also appeared that the defendant was in partnership under the firm of *Thornton* and *West*, and that *Thornton* and *West* had shipped goods on board the James Scott, as well as *Thornton* separately on his own account; and it was objected that the agreement signed by the defendant related to the goods belonging to the firm, or that, if it related to the goods of the defendant also, an additional stamp was necessary, or at all events that it was ambiguous to which agreement the stamp applied. The learned judge reserved this point also. It was then contended for the defendant that the plaintiff was not entitled to recover, as it did not appear that the transhipment was necessary, and that, even if it were, the master of the ship, by making a new contract for the freight of the cargo to the port of destination, made it as the agent of the consignee of the goods, and not for the ship-owner, and that the latter was not entitled to make a profit by the transhipment.

The learned judge left it to the jury to say, first, whether the transhipment was justifiable; and, second, whether the defendant, with the knowledge of the circumstances, agreed to receive the goods and pay the difference of freight. The jury found a verdict for the plaintiff, damages 584*l*.

Cresswell having obtained a rule nisi, in Michaelmas term, 1836, for a nonsuit or a new trial,

Thesiger and *Cleasby* shewed cause in Hilary term last (*a*).

First point: An agent, who has employed the attorney to commence the action for the plaintiff, is not an incompetent witness.

I. There was nothing on the evidence to shew that Mr. *Ellwand* was incompetent. He said, on his examination, that he employed Mr. *Edis*, as *agent* for the plaintiff: therefore, primâ facie, Mr. *Edis* would clearly look to the plain-

(*a*) Jan. 26th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

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tiff for his costs. But supposing even that this retainer of the attorney would make *Ellwand* liable in the first instance, that would not make him an incompetent witness, as the interest to disable a witness must arise from the result of the suit. Whichever way that terminated, *Ellwand* would recover from the plaintiff any costs which he might have to pay. It is not, however, sufficient to shew a probability of the witness having an interest in the suit; it must be made out with certainty in order to disqualify him: 1 *Stark.* Ev. 102–4, 2nd ed. [Lord *Denman* C. J. We are strongly of opinion at present that this objection is not sustainable.]

Second point: An agreement relating to two subject-matters, in which the same parties have an interest, does not require two stamps.

II. The agreement signed by the defendant is said to require two stamps, because it relates to the goods not only of himself, but also of his firm, and therefore is in fact two agreements; and *Powell* v. *Edmunds* (*a*) is relied upon. But that case is hardly an authority either way, for it only decided that, where one piece of paper contained two contracts, and a stamp was affixed on that part of the paper which contained the contract relied upon, the stamp was sufficient. *Doe* v. *Day* (*b*) is a case to the same point, and is also inapplicable; for as the agreement was also used in the subsequent action of *Shipton* v. *Thornton and West* (*c*), it is necessary to satisfy the Court that, although the plaintiff had two distinct interests in the subject-matter of the agreement, one stamp was sufficient. The principle was laid down by Lord *Ellenborough*, in *Doe* v. *Day* (*b*), that where one instrument affects the separate interests of several, one stamp is sufficient, if there is "a community of the same subject-matter as to all the parties." And it is not necessary that there should be an entire community of interest, as was laid down in *Allen* v.

(*a*) 12 East, 6.

(*b*) 13 East, 241.

(*c*) This was an action, brought at the same sittings, for the freight on the goods belonging to the firm of *Thornton* and *West*, and similar points were raised to those in the principal case. It was assumed, on the argument on both sides, that the agreement in p. 218 was given in evidence in both cases; but it afterwards appeared, by the note of *Coleridge* J., that the agreement was not given in evidence in the action of *Shipton* v. *Thornton and West*.

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Morrison (*a*). So, in *Hall* v. *Smith* (*b*), where a promissory note, beginning "I promise to pay," was signed by one member of a firm for himself and partner, it was held that the party signing was liable to be sued severally. The agreement therefore, as against the plaintiff, was one and entire. He was actually interested in the whole subject-matter; in a different degree, no doubt; but that, as has been seen, does not affect the principle. There may be two promises, but there is only one agreement and one consideration; and it has been held that an indenture binding an apprentice to two successive masters, does not require two stamps; *Rex* v. *Inhabitants of Louth* (*c*). So also where there is an assignment of prize money, with several interests, one stamp only is necessary; *Baker* v. *Jardine* (*d*). In *Stead* v. *Liddiard* (*e*), where a letter was produced containing an agreement between the plaintiff and a third party, and also an indorsement on the back, containing a guarantee by the defendant according to the terms of the within agreement, it was held that one stamp was sufficient.

Third point: Evidence of the necessity of transhipment.

III. The next point is, that sufficient evidence of the necessity of transhipment was not given. But the plaintiff was not required to give this proof: for there being only one contract in the bill of lading, to deliver the goods in the port of London, and the defendant having accepted the goods, the question does not arise. The defendant therefore cannot say that the contract was not performed, and he has in fact admitted the necessity of transhipment. But if the plaintiff was bound to give evidence of a transhipment being necessary, the evidence was sufficient to warrant the verdict. The question of transhipment was slightly discussed in *Hunter* v. *Prinsep* (*f*), and more fully in 1 *Marsh.* Ins. p. 161 et sqq. 3d ed.

IV. The last point is, the goods having been brought to

(*a*) 8 B. & C. 565; *S. C.* 3 Mann. & R. 70.

(*b*) 1 B. & C. 407; *S. C.* 2 D. & R. 584.

(*c*) 8 B. & C. 247; *S. C.* 2 Mann. & R. 273.

(*d*) 13 East, 235, n.

(*e*) 1 Bing. 196; *S. C.* 8 Moore, 2.

(*f*) 10 East, 378.

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the port of London and ready for delivery, what freight was the plaintiff entitled to? The defendants contend that they are only bound to pay freight pro ratâ to Batavia, and the amount of the freight actually payable per the Mountaineer. But the plaintiff is clearly entitled to the whole freight under the original bill of lading. This point has never been expressly laid down, but it has been assumed in many cases as an established principle. In *Cook* v. *Jennings* (*a*), *Lawrence* J. said, "When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another; and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight unless he performs his whole voyage." So, in *Abbott* on Shipping, 303 (5th ed.), it is laid down generally that, if the ship is disabled and unable to prosecute her voyage, "the master may, if he will and can do so, entitle himself to his whole freight." So, in *Luke* v. *Lyde* (*b*), Lord *Mansfield* said, "If a freighted ship becomes *accidentally* disabled on its voyage (without the fault of the master), the master has his *option* of two things; either to refit it, if that can be done within convenient time, or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the *whole* freight of the *full voyage*. And so it was determined in the House of Lords, in the case of *Lutwidge and How* v. *Grey et al.*" (*c*). If this be sound law, then an authority is not required to prove that if transhipment does take place, and the goods are carried to their port of destination, the ship-owner is entitled to the whole freight. The original contract subsists throughout all the transhipments, and no new contract is raised on the bill of lading by the ship which brings the goods into port. This was determined by *Lutwidge* v. *Grey* (*c*). If indeed there were no necessity for transhipment, then the ship-owner would be liable in a cross action; but it is hardly to be conceived that it ever would take place without a strin-

Fourth point: What amount of freight is payable where transhipment has been necessary.

(*a*) 7 T. R. 381.
(*b*) 2 Burr. 882.
(*c*) Abbott on Shipping, 307, 5th ed.

gent necessity for it. If there is necessity for it, the owner of the goods is in nowise damaged: his insurance, as clearly appears from 2 *Marshall's* Insur. 374 et sqq., where the subject is discussed at length, would continue on the new ship, and the contract by the ship-owner is performed almost in terms.

Cresswell, contrà. I. *Burrell* v. *Jones* (*a*) is a strong authority to shew that the witness *Ellwand* made himself personally liable to the attorney for costs. There the defendants signed an undertaking, "as solicitors to the assignees," to pay the landlord his rent; and it was held that they had made themselves personally liable. That case was followed up by *Iveson* v. *Conington* (*b*), where the attornies for the parties to a suit personally consented to withdraw the record, and that costs should be taxed for the defendant; and it was held that the attorney for the plaintiff had made himself personally liable for the costs. There can be little doubt that, if *Ellwand* had been sued on this retainer of the attorney, he would have been held liable, and it does not remove the incompetence of a witness, that he has a remedy over; for a surety is not a good witness. First point.

II. It appears that the plaintiff was interested in part of the goods on board the Mountaineer on his own account, and in part as one of the firm of *Thornton* and *West*. Then he signs the agreement as *Thornton* and *West*, but it begins in the singular, "I." Of course *Thornton* and *West* would be bound by the agreement as to the partnership goods. *Hall* v. *Smith* (*c*) is an entirely different case; the Court held there that the instrument signed by one partner for the firm was several as well as joint, and there was no question as to two contracts being contained in it. The signature of the plaintiff was either in his own behalf in respect of his own goods, or in Second point.

(*a*) 3 B. & A. 47.
(*b*) 1 B. & C. 160; *S. C.* 2 D. & R. 307.
(*c*) 8 B. & C. 407; *S. C.* 2 D. & R. 584.

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respect of the goods of the firm; it cannot be treated as the signature in behalf of both interests. It is doubtful then to which the stamp applies. With regard to the necessity of transhipment having been admitted by the defendant, how is that sought to be made out? The defendant does not receive his goods under the original bill of lading, but under the bill of the Mountaineer. The defendant could not have got his goods under the original bill of lading. The plaintiff made them deliverable to his own agent: when the defendant applied for them, the agent refused to let him have them, unless he paid the whole freight. The defendant therefore was obliged to pay to get his goods, as the agent *Ellwand* had a lien upon them. Suppose then there had been no original contract, could the defendant have been liable for more than the actual freight? Then, if the letter of the defendant is pressed in as an admission to bind him, is it not clearly relied on as a contract, so as to make a stamp necessary? The case of *Baker* v. *Jardine* (*a*) is not applicable to this case, for there only one fund existed; but *Doe* v. *Day* (*b*) is strictly in point. In that case it appeared that Sir *Lionel Copley* had entered into an agreement with his several tenants, containing the respective rent to be paid by each of them; and it was held that, if it had been sought to substantiate the several contracts, distinct stamps would have been necessary for each of them. [*Coleridge* J. Would two stamps have helped this case?] If there are two contracts, two stamps would have made the letter admissible. It is a contract as to *Thornton* and *West;* if it is not also a contract as to *Thornton* alone, cadit quæstio, for then there is nothing to shew that the necessity of transhipment was admitted.

Fourth point.

IV. Lastly, assuming that there was a necessity for transhipment, the plaintiff was only entitled to his freight pro ratâ to Batavia, and to the freight actually incurred on the rest of the voyage. It is remarkable that this point has never been raised before. Without doubt, where a tran-

(*a*) 13 East, 235, n. (*b*) 13 East, 241.

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shipment is necessary, the master is entitled to perform his contract in a new ship. But no cases shew that the master may make a new contract on the part of the freighter, and then sue the freighter on the old. [*Coleridge* J. Is not the second contract a sub-contract between the two ship-owners, not between the first ship-owner and the freighter?] The ship-owner has no right to make it so. The master, it is true, is the agent of the ship-owner, but he is also, to a great extent, a trustee for the freighter. Performance under the second contract is not performance under the old. The defendant has not obtained the benefit he stipulated for, namely, the transport of goods by a ship of his own selection. In what a condition would the consignee be placed, if the benefit of the second contract is to be entirely unilateral. Suppose the second ship is chartered at a much higher rate of freight, the consignee could not obtain his goods without paying this additional rate; yet he could not recover this back from the ship-owner, because it would be a voluntary payment. Another point would arise as to the insurance, whether that could be renewed where a transhipment has taken place. The only case cited on the point by Serjt. *Marshall* (*a*) is *Plantamour* v. *Staples* (*b*); but that was a very peculiar case. There the underwriter admitted he was liable on the voyage from Marseilles to Pondicherry, though the goods were conveyed in another ship, but as the plaintiff's agents at Pondicherry sold the goods, and invested the proceeds in others, which he embarked on board another vessel for the port of destination, the underwriter disputed his liability under the circumstances; but the Court held that under the terms of the policy he was liable. Then, again, what a temptation it holds out to ship-owners to tranship into an inferior vessel at a much lower rate of freight, and put the difference into their pockets. (He then argued that the evidence at the trial as to the necessity for transhipment was insufficient.)

Cur. adv. vult.

(*a*) 2 Marshall's Ins. 377. (*b*) 1 T. R. 611, n.

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Lord DENMAN C.J. on this day delivered the judgment of the Court.—This was an action tried at Guildhall by my brother *Coleridge*, in which the plaintiff recovered a verdict. Several objections were made at the trial, and renewed on motion before us.

First point.

The first of these was on the alleged incompetency of one *Ellwand*, the principal witness on the part of the plaintiff, on the ground of his liability to the attorney. Upon the *voire dire* he stated as follows:—"I employed Mr. *Edis*, the attorney who commenced this action, as plaintiff's agent —he has been dead some time—there is a new attorney. I have not been released—no demand has been made on me—I did not state to him he was to look to the plaintiff, and not to me." It was argued, first, that although the witness had in truth acted as the agent of the plaintiff, yet he had rendered himself personally liable; and then that this was the ordinary case of incompetency, arising from the employment of the attorney in the cause. We are of opinion, however, that the facts stated differ this from the ordinary case, and that no objection was established with sufficient clearness to warrant the rejection of the witness. It is a well-founded and important rule, that the objector to a witness, on the ground of interest, is bound to shew the interest with certainty and clearness; and that it is not enough to give evidence of circumstances from which such interest is a probable inference, when at the same time other circumstances appear which make it probable, even in a less degree, that no such interest exists. For the Judge who is to decide the question ought not to be called on to draw a conclusion of fact from conflicting evidence; as the law is to be pronounced upon the fact, there will be a difficulty in reviewing his decision as to the former, where the evidence admits of different conclusions as to the latter; because the grounds on which he has decided will be unknown: and as objections on the score of interest are not to be favoured, the safe rule is to admit the witness wherever there is doubt on the fact. It is then still open

for the objector to urge the same circumstances to the jury, as proper to lessen the credit of the witness with them, and, according as they, who are the fit tribunal to weigh questions of doubtful fact, believe, or interpret those circumstances, it is to be presumed the testimony of the witness will operate with more or less weight on their minds.

According to these principles the answers of the witness, in order to sustain the objection, should have clearly shewn, first, that he had originally made himself liable to *Edis;* and, secondly, that since *Edis*'s death the liability had remained unsatisfied, or had been transferred, and was continued in favour of the present attorney. Now admitting, for the sake of the argument, that the first was to be legitimately inferred from the statement of the witness, the second was by no means made out. Until it was shewn under what arrangement the papers in the cause had passed on *Edis*'s death, from his representatives to the present attorney, it was at least equally probable that they had been satisfied before they had parted with them; and there was no evidence that the witness had been a party to the transfer, or in any way retained the present attorney, so as to make him liable *to him* in respect of his original employment of *Edis*. Therefore, without interfering with the general rule, we think, in the case before us, that the objector had not gone far enough to substantiate the incompetency of the witness.

This makes it necessary to consider the next objection, which arose on the reception of a document under the following circumstances. The defendant, it appeared, traded on his own account, and also as partner with one *West*, under the firm of *Thornton* & *West*. Goods belonging to himself individually, and also goods belonging to the firm, had been shipped from Batavia for England, on board the James Scott, and bills of lading transmitted to the defendant. The goods, under some alleged necessity, had been transhipped on board the Mountaineer and Sesostris at Sincapore, and these vessels were consigned to the witness *Ellwand*. The

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defendant, in an interview with him, claimed both parcels, by virtue of the bills of lading which he held by the James Scott. The rate of freight agreed on by that vessel was considerably higher than that which the plaintiff, her owner, had procured the goods to be conveyed home by the Mountaineer and Sesostris; and the witness on his behalf claimed that difference. The defendant, as he stated, agreed to pay that difference; but, as the amount was not then ascertained, and he was desirous of receiving the goods at once, he signed two undertakings, and upon the faith of it the goods were delivered to him. That upon which the present question arose, and which related to the goods on board the Mountaineer, was as follows. (His lordship then stated it.) This paper bore a single stamp, and its reception was opposed, on the ground, first, that on the face of it, being signed in the name of the firm, it must be taken to refer to the partnership goods alone, for that the defendant had no right to bind the firm as to the freight of his own goods; and, secondly, that, if it could be held that this signature bound the defendant at all events, the undertaking beginning and ending in the singular number, yet, as it clearly bound the firm to the extent of the partnership goods, the instrument amounted to two undertakings, one by the defendant alone as to his own goods, and another by the firm as to their's; and if so, there being two undertakings as to two separate subject-matters, two stamps, it was said, were necessary. And, assuming this to be correctly argued, the case was distinguished from several cited in the argument, in which a community of interest or a common divisible subject-matter has been held to make a single stamp available, though there have been many signatures to the instrument, and it may in certain senses be said to evidence a plurality of contracts. After much consideration we are of opinion that this objection cannot prevail. In order to ascertain its force it will be convenient to examine, in the first instance, what would be the effect of this instrument without reference to the

Stamp Act. It appears that the defendant had been applying for the delivery of both parcels of goods; he had an interest in both, and it was competent for him to make himself personally liable for the freight of both. In point of fact he had delivered this undertaking as the mean by which he was to procure the delivery of both parcels. Now if he had written and signed an undertaking expressly naming both parcels, it cannot be doubted that it would have bound him for both, if signed in his own name; so if he had signed the undertaking in question in his own name, as no distinction is made between the two parcels, and the words are large enough to cover both, we see no reason for saying that he would not have been liable for the freight of both.

The question then is, whether, having received the goods belonging to himself upon the faith of this undertaking, as well as those belonging to the firm, he can now object, in an action for the freight of the former, that this mode of signature does not bind him personally as to *this* freight, because the undertaking so signed would bind the firm as to the other freight; and the language of the instrument, on its face, may be satisfied by so applying it. We think he cannot. The names which he has chosen to affix as the signature are his own words, of his own choice, and must be taken most strongly against himself. His partner, indeed, could not be bound by his (the defendant's) agreement to pay for more than the freight of the partnership goods, but the defendant is liable on both accounts; and when it is proved that he had been taking on himself to deal in respect of both, and delivered the undertaking in reference to both, it becomes immaterial what signature he affixed, for he at least must be bound by it. If this would be the effect of the instrument, independently of the Stamp Act, it remains to consider whether that makes any difference. Now in the view we have taken of it this is but one agreement entered into by the defendant respecting the freight of two parcels of goods; and being but one agree-

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ment, however many distinct articles it may embrace, one stamp only can be necessary. In the present action the breach is only insisted on as regards the defendant's own goods; and the only question we have to consider is, whether it is properly stamped, so as to be receivable in *this* action; whether it may be tendered in some other action is immaterial. If, indeed, we saw that there were two agreements on the face of the instrument and only one stamp, then, because it would be uncertain to which agreement the stamp was intended to be applied, we ought to receive it as evidence of neither; but this difficulty is removed by considering it to be but one agreement, and if it be but one entire agreement, embracing for its subject-matter the freight both of the defendant's goods and the goods of the firm, the legal conclusion is, that it founds an action against him as to both, and against the firm as to neither.

Fourth point.

It remains to consider an objection to the plaintiff's recovery, which is directed more to the merits of the case. Upon the trial it appeared that the plaintiff had been paid freight by the James Scott, at the rate originally agreed on, for so much of the voyage as had been performed up to the ship's arrival at Sincapore, and for the remainder of the voyage to London at the rate at which he had contracted for the carriage of the goods by the Mountaineer and the Sesostris. The action was brought for the difference between the two rates for that portion of the voyage. And it was objected that for this portion of the voyage he was not entitled to receive more than he had actually paid; while on the part of the plaintiff it was contended that, the necessity of the transhipment being assumed, which it must be for the purpose of the argument, the Mountaineer and Sesostris were to be considered as the James Scott; that the master had fulfilled his undertaking in carrying the goods to their destination, and had therefore earned his full freight; while it was a matter of indifference to the owner of the goods whether they had arrived safe by one vessel or the other. No authority bearing directly on the

point from our own law books was cited on either side in the argument; it was treated very much as a new point to be decided on principle, and our own researches have led us to the same conclusion.

On the part of the defendant we were pressed with the impolicy of holding out any temptation to the ship-owner or master to make unnecessary transhipments of goods, the inconvenience of any transhipment, whereby the goods themselves run the hazard of damage, the policy of insurance may become questioned, and the owner of the goods, at all events, loses the benefit of a conveyance by that vessel in which he may be supposed to have confidence, and for which, at all events, he has stipulated; all these circumstances, coupled with a consideration of the unprotected state in which his interests are at a distant port, must certainly be allowed to have great weight. But, after all, these seem to point to a vigilant examination of every case of transhipment, to see that its necessity be well established, rather than to decide the present question. This must turn upon the nature of the contract between the parties, as it is to be collected from our own books, and still more fully, perhaps, from those foreign laws and ordinances, as well as the writings of those jurists, to which our Courts have long been accustomed to have recourse for guidance on subjects of this nature.

It is clear that by the contract the ship-owner (and the master as his agent) is bound to carry the goods to their destination in his own ship, if not prevented from doing so by some event which he has not occasioned, and over which he has no control. "The master," says Lord *Tenterden*, in his book on Shipping, 241, 5th ed. "should always bear in mind that *it is his duty to convey the cargo to the place of destination*; this is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method." When, however, such an event has occurred to interrupt the voy-

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age as above defined, and the ship-owner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point, whether or not he is *bound* to tranship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise, by the *vis major* which prevents his accomplishing it in the literal terms of his undertaking. By the Rhodian law, the Laws of Oleron, art. 4, and the ordinances of Wisbuy, art. 16, the master was at liberty, but was not bound, to tranship. The old French Ordinance, on the other hand, in precise terms imposed the obligation upon him: "En cas que le vaisseau ne puisse être raccommodé, le maitre sera obligè d'en louer incessament un autre." Art. 11, tit. Du Fret. The terms of this ordinance occasioned, however, much controversy, *Pothier* and *Valin* (*a*) maintaining they were not imperative, except as the condition of carrying full freight; *Emerigon*, on the other hand, insisting that the duty was strictly cast upon the master, *as the agent of the freighters* (*b*). The modern French code appears to adopt this view of the question. The words of the Code de Commerce, s. 296, are on this point almost the same as those we have cited from the ordinance; and it is stated by Chancellor *Kent*, who in his Commentaries, vol. 3, p. 207—12, 3d ed., very ably and learnedly sums up the whole question that *Boulay-Paty* and *Pardessus*, in their commentaries on it, have agreed in holding to the construction adopted by *Emerigon*.

All authorities, however, are in unison to this extent, that the master *is at liberty* to procure another ship to transport the cargo to the place of destination; and in these words Lord *Tenterden* cautiously lays down the rule

(*a*) Pothier, vol. ii. Traité des Contrats de Louage maritime, part 1, § 3, s. 68; Valin, art. 11, tit. Du Fret, tom. i. p. 618.

(*b*) Traité des Assurances, vol. i. ch. 12, s. 16.

of our law (*a*). It may, therefore, safely be taken to be either the duty or the right of the ship-owner to tranship, in the case above supposed: if it be the former, it must be so in virtue of his original contract; and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment: on the other hand, if it be the latter, a right to the full freight seems to be implied—the master is at liberty to tranship;—but for what purpose, except for that of earning his full freight at the rate agreed on? In the case supposed we may introduce another circumstance: Let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port; there is then no question but that the whole freight at the original rate must be paid, and that, because the freighter prevents the master, who is able and willing, and has the right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract. If, therefore, the owner of the goods be not present and personally exercises no option, still the ship-owner, in forwarding the goods, must have the same rights, and in so doing must be taken to exercise them with the same object in view.

We come to the conclusion, therefore, that the plaintiff in the present case was entitled to recover the difference he sued for; and in the examination we have made we have been compelled purposely to omit many states of circumstances and modes of testing the argument, which would not have been without their weight, but yet are of minor consideration. One question, however, has been asked, which it will not be right to pass over: what, it has been said, if the transhipment can only be effected at a higher than the original rate of freight,—which party is to

(*a*) Abbott's Shipping, 240, 5th ed.

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the master of the aforesaid mystery; and that two of the commonalty should be elected wardens, and also that there should be thirteen or more, not exceeding twenty-four of the commonalty, assistants; that it should be lawful for them to hold a court, and make by-laws, to be enforced by such pains, punishments, and penalties by imprisonment of the body or by fines, as to the master, wardens, and assistants for the time being might seem fit; and that the said master, wardens, and commonalty aforesaid and their successors, might have the said fines, &c. to their own use, without the impediment of the said king, his heirs or successors. The declaration then stated, that in 1823 the following by-law was made:—"Every person being of the clothing or livery of the said mystery or art, who should be thereafter chosen to be steward of the said mystery or art, and should neglect or refuse to take on him the execution of the said office, should forfeit and pay to the master and wardens of the said mystery or art for the time being, or to one of them, for the use, relief and maintenance of the said mystery or art, the sum of 15*l.*, and the said fine being reasonable, &c. was afterwards, on &c., examined, allowed and approved of by *John* Earl of *Eldon*, then Lord High Chancellor, Sir *Charles Abbott*, Knt. then Chief Justice of the King's Bench, and Sir *Robert Dallas*, Knt. then Chief Justice of the Common Pleas, according to the form of the statute in such case made and provided." The declaration then stated, that on 16th May, 1833, the defendant, being of the clothing or livery &c., was duly chosen to be steward of the mystery for the year next ensuing, but that he refused to take upon himself the execution of the said office. Averment, that at the time of such election and refusal the said *W. Graves*, the plaintiff, was master, and the said other plaintiffs were wardens, of the said mystery or art; whereby an action hath accrued to the said plaintiffs, so being master and wardens of the aforesaid mystery, to demand and have, &c.

Pleas: 1st, that the defendant did not refuse to take upon himself the execution of the said office: 2nd, that at the time of the commencement of the suit the plaintiff *Graves* was not nor is the master, nor the plaintiffs the wardens, of the said mystery or art.

Replication, to the first plea, similiter: to the second, that at the time the defendant was so chosen &c., and at the time he so refused &c., the plaintiff *Graves* was master, and the plaintiff *Cheeswright* was warden, of the said mystery or art;—concluding to the country.

General demurrer, and joinder in demurrer.

R. Gurney argued in support of the demurrer, in Hilary term last (*a*). I. If an action is maintainable at all on this by-law, it should be brought in the names of the master and wardens who were in office at the time of bringing the action, in analogy to the actions to be brought by overseers on bonds given to indemnify parishes against the expenses of bastard children; in which cases the actions must be brought by the overseers for the time being; *Addey* v. *Wooley* (*b*). In that case an attempt was made to bring an action by the overseers to whom the bond had been given; but the Court held that the expression, "the overseers for the time being," in the 54 *Geo.* 3, c. 170, s. 8, confined the action to the overseers in office at the time of action brought. So in *Doe* v. *Terry* (*c*) the action by the parish officers, for parish property, was held rightly brought by the churchwardens and overseers for the time being. It is true that in those cases acts of parliament enable the succeeding parish officers to bring the action; and it may be that the present by-law is so framed as not to enable the master and wardens for the time being to sue, but that is a defect in the terms of the by-law.

(*a*) Jan. 16th, before Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge*, Js.

(*b*) 3 B. Moore, 21.

(*c*) 4 A. & E. 274; *S. C.* 5 N. & M. 556.

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II. The by-law is altogether void. It has been laid down that a by-law, reserving a penalty to a stranger to the corporation, is void, because it would be assigning a chose in action. This was decided, after much consideration, in *Bodwic* v. *Fennell* (*a*), and again in *Totterdell* and *Harris* v. *Glazby* (*b*). The only exception to this rule is in the case of the chamberlain of London, who, it appears, may sue for a penalty: *Case of the Chamberlain of London* (*c*). The objection indeed was not taken in that case, that he was a stranger to the corporation, but his case stands on peculiar grounds. He is a corporation sole, and is intimately connected with the corporation of London. In the course of time his privileges in this respect were communicated to the chamberlain of Bristol; *Hollings* v. *Hungerford* (*d*); on the ground that the chamberlain was part of the corporation. But in *Bodwic* v. *Fennell* (*a*), *Dennison* J. observed, "I am not for carrying the right to sue further than the chamberlain of a corporation." These cases shew distinctly that no stranger to the corporation may sue, and that although an established officer, like a chamberlain, may recover the penalty for the corporation, there is no authority for an ex-chamberlain suing. Now, for aught that appears on this record, the present plaintiffs were not members of the corporation at the time of action brought, and it is doubtful, even if they were, whether, on the principle laid down by *Dennison* J., they could maintain the action.

Sir *W. W. Follett*, contrà. The charter enables the corporation to make by-laws with penalties, and provides that the master, wardens and commonalty shall have the penalties to the use of the corporation. Now it is hardly contended that the by-law is not good; and the main question is, whether the master and wardens who were in office when the penalty was incurred, may not recover it for the use of

(*a*) 1 Wils. 233.
(*b*) 2 Wils. 266.
(*c*) 5 Rep. 62.
(*d*) Cited in *Bodwic* v. *Fennell*, 1 Wils. 235.

the corporation. [*Coleridge* J. The difficulty in my mind is, how the corporation, after being empowered to sue in their corporate capacity, can delegate that power to any one else.] The cases shew that they can: the chamberlains of London or of Bristol are not empowered by the respective charters to sue, but only by the construction of the Courts. The principle is this; the corporation cannot give the penalty on a by-law to a stranger, as in *Bodwic* v. *Fennell* (*a*); but if it is reserved to a member of the corporation or trustee for its use, then he may sue on behalf of the corporation. It is not easy to understand the case of *Totterdell* v. *Glazby* (*b*), where the corporation of Bath made a by-law, giving a penalty of 3*s*. 4*d*. a day against any one exercising the trade of a tailor, not being free of the Company of Tailors within that city, the penalty to be recovered by action of debt, by the masters of the said company, for the use of the poor of the Company of Tailors; and the Court held the by-law bad, because the tailors were strangers to the corporation. For, if the by-law was for the benefit of the Company of Tailors within the city, the by-law would seem to be good. In *Willcock* on Corporations, 156, it is laid down, "If the injury be to a particular company, as where the custom excludes foreigners from the practice of a particular trade, or from the practice of the trade of a certain company, as well freemen as foreigners, unless free of that company, the penalty of the by-law ought not to be given to the municipal corporation or their officer, but to the company injured, or their treasurer in trust for them." And he cites several cases for the position. If the case be good law, it must be on the ground that the by-law was intended to impose a burden for the benefit of the corporation, and not to protect the privileges of the company.

Then, as to the plaintiffs being strangers to the corporation, it is clear that they cannot be considered so. In

(*a*) 1 Wils. 233. (*b*) 2 Wils. 266.

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Ellington v. *Cheney* (*a*), debt on a by-law was brought by the master of the Guild of Shoemakers of Bath, and he recovered, and the judgment was affirmed in error. So in *Hollings* v. *Hungerford* (*b*), where objection was taken to the chamberlain of Bristol suing on a by-law of the corporation, Lord *Parker* C. J. held that the action was well brought, and that the Court would take notice of the relation there is between the chamberlain and the corporation. It cannot be contended that the chamberlain of Bristol is a corporation. The ground then on which a by-law is bad, reserving a penalty to a stranger, is not that it is a delegation of the authority to sue, but that it is reserving it to a stranger, who has no interest in the by-law. In *The Company of Feltmakers* v. *Davis* (*c*), where the master, wardens and assistants made a by-law, with a penalty of 10*l.* on every member of the company refusing to serve an office, and the whole company sued for the penalty, the count was held bad; and *Eyre* C. J. said, "If the by-law is badly framed, it is the fault of those who framed it. If they have chosen to empower their master and wardens to sue, the Court cannot look any further: no regulation with respect to the payment of the money by them to any other person, will vary the right of action." . . . . "The master and wardens may maintain the action, and apply the money to the use of the company. They may sue in the same manner as the chamberlain of London does for the corporation of London, and they would probably declare both in their natural and official capacities." It is clear therefore that a by-law, reserving a penalty to a member of the corporate body, for the use of the corporation, is valid.

Then comes the main objection, whether the action should be brought by the master and wardens of the time when the penalty was incurred, or of the time of action brought. This is nearly the same question; for if the penalty is re-

(*a*) Cited in *Bodwic* v. *Fennell*, 1 Wils. 235.

(*b*) Cited in *Bodwic* v. *Fennell*, 1 Wils. 235.

(*c*) 1 B. & P. 98.

served to an officer for the benefit of the corporation, it is reserved to him in his personal capacity, and therefore the right of action becomes vested in him directly the penalty is incurred. As to the case of *Addey* v. *Wooley* (*a*), if an act of parliament vests the right of suing on a bond, given to preceding overseers, in the overseers for the time being, that is by express provision of the legislature: but if there is no act, then if the right of action is once vested, what becomes of it? for it is neither released nor destroyed. [Lord *Denman* C. J. We do not know now that the plaintiffs are members of the corporation at all; they may have ceased to be so.] Supposing them not to be so, the by-law does not require that it should be sued upon by members of the corporation for the time being, as in *The Company of Feltmakers* v. *Davis* (*b*). The present plaintiffs sue on behalf of the corporation, and that is all that is required. If they had died before action brought, the right of action would probably vest in their executors, but it could not pass to their successors.

R. Gurney, in reply. As to the case of the overseers, there is no reason why the words "for the time being," which is applied to the master and wardens in this by-law, should be construed differently from the same words in the 54 *Geo.* 3, c. 170, s. 8. Reliance is placed on *The Company of Feltmakers* v. *Davis* (*b*); but the decision in that case was, that the corporation at large could not sue on the by-law; and it may be conceded that here also the corporation could not sue; but that does not advance the case. It is also said that the action would survive to the plaintiff's executors; but they clearly would be strangers to the corporation; and so in fact are the present plaintiffs, so far as it appears by the record. [*Littledale* J. They state that the action has accrued to them, so being the master and wardens of the mystery. The defendant would have been jus-

(*a*) 3 B. Moore, 21. (*b*) 1 B. & P. 98.

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tified in paying the money to the corporation; or if the penalty had been paid to the plaintiffs, and they had misappropriated it, the corporation could recover from them.]

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—It is not disputed but that the subject-matter of the by-law, as confirmed by the Lord Chancellor and two Chief Justices, is legal. But the objections to the action are, first, that, as the charter directs that the master, wardens, and commonalty of Turners shall have the fines and amerciaments for the breach of the by-laws to the use of the master, wardens, and commonalty, the fine ought to have been directed to be paid to the masters, wardens, and commonalty, and not to the master and wardens of the mystery or art, though it be expressed to be paid for the use, relief, and maintenance of the mystery or art. The next objection is, that supposing the by-law to be valid as far as relates to the penalty being to be paid to the master and wardens of the mystery or art, for the use, relief, and maintenance of the mystery or art, yet that the action ought not to be brought by the present plaintiffs, who, though they were the master and wardens when the penalty became forfeited, yet they had ceased to be so before the action was brought, and that the action, if maintainable at all, should now be by the corporate body at large, or else by the persons who were the master and wardens when the payment was sought to be enforced by bringing the action. As to the first objection, we think that a by-law made by a corporation cannot direct the payment to be made to a stranger to the corporation, with the exception, indeed, that it may be made payable to the chamberlain, who is considered as the treasurer of the corporation, and which, therefore, is in effect making it payable to the corporate body itself, because he is the officer whose duty it would be to receive the money, and to take care of it when so received. This appears from the case of *Bodwic* v. *Fen-*

nell (*a*), where the penalty was given to any person who would sue for it. The case underwent much consideration, and the Court gave judgment, that, although a body politic has power to make a by-law to enforce a penalty for breach of a custom, yet they cannot give an action to recover that penalty to a stranger, but the corporation themselves, or somebody for them, as the chamberlain in the case of the city of London, must sue for it. If the law were otherwise, it would be very inconvenient; it would be like assigning a chose in action, which the policy of the law will not endure. In the course of the argument some cases were cited which establish the principle, with the exception as to the chamberlain. In the case of *Hollings* v. *Hungerford* (*b*), 3 *Geo.* 1, which was debt on a by-law for the recovery of a penalty by the chamberlain of Bristol, the by-law was made under a power in their charter to make by-laws for penalties to be recovered for the use of the corporation; and an objection was made that the chamberlain was a stranger to the corporation—a stranger to the right, and therefore a stranger to the remedy: but it was held that the action was well brought, and that *camerarius ex vi termini* signifies the thesaurarius of the corporation; and they declared that he recovered for the benefit of the corporation. And the Court would take notice of the relation there is between the chamberlain and the corporation, and that he is no stranger, but as it were part of the corporation. In the case of *The Chamberlain of London* (*c*), it was considered that a penalty might be payable to the chamberlain of London. And so also in *Bosworth* v. *Horne* (*d*), an action for the penalty of a by-law was brought by the chamberlain of London. In *The Mayor &c. of Bedford* v. *Fox* (*e*), a penalty was made payable to the chamberlain of Bedford, and no objection on that account. In *Hesketh* v. *Braddock* (*f*), a penalty was

(*a*) 1 Wils. 233.
(*b*) Cited in *Bodwic* v. *Fennell*, 1 Wils. 235.
(*c*) 5 Rep. 62.
(*d*) Cas. temp. Hardwicke, 405; 2 Strange, 1015.
(*e*) 1 Lutwyche, 562.
(*f*) 3 Burr. 1847.

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made payable to the Treasurers of Chester. The case of *Totterdell and Harris, Masters of the Tailors' Company at Bath*, v. *Glazby* (*a*), is a very strong one to shew that a penalty cannot be made payable to a stranger. The by-law was made by the corporation of the city of Bath, in which city there was a guild and company of tailors, free of the city, and two masters for the government thereof, and a custom that none should exercise the trade of a tailor within the city, unless he was free of the trade and city; and a by-law was made by the corporation of the city, imposing a penalty of 3*s.* 4*d.* a day against any one exercising the trade, not being free thereof, to be levied by distress, or recovered by action of debt, by the masters of the company for the time being, for the use of the poor of the Company of Tailors. The Court held the by-law was a bad one, because these tailors are not the corporation of Bath, and therefore the by-law is ill in giving the action to the masters of the Tailors' Company for the time being, who are strangers to the corporation of Bath; for to give it to any body else is like assigning a chose in action, which the policy of the law will not allow. And this case is the stronger, because the penalty was made payable to the persons for whose benefit, in trust for the poor of the company, the penalty was to be applied. At the same time, if the doctrine of this case were necessary to support the judgment we are about to pronounce, we should pause a little; for it is very extraordinary that, in little more than two years after this decision in the Common Pleas, which was in Trinity term 5 *Geo.* 3, a case was decided in the King's Bench, in Michaelmas term 7 *Geo.* 3, by the name of *Woolley and another* v. *Idle* (*b*), where the plaintiffs were the Masters of the Fellowship and Company of Master Tailors of the city of Bath, for a penalty under the very same by-law, at least as far as appears, and judgment for the plaintiffs on demurrer, Lord *Mansfield* saying there was

(*a*) 2 Wils. 266. (*b*) 4 Burr. 1951.

no doubt. It is very true the question there was solely upon the validity of the custom, and no objection made to the by-law, as in the case in *Wilson*. But the most extraordinary part of the case is, that in little more than two years the masters of the same company should have thought of bringing an action on a by-law which had been held bad, and that the defendant should not have raised the objection; because the circumstances of the former decision must have been known, one would suppose, amongst the tailors in Bath, persons most interested. But we are to consider, in the case before us, whether the penalty, being made payable to the master and wardens for the use of the company, is bad on that account. The master and wardens are not strangers to the company, for they are the two chief integral parts of the corporation. It is to be observed, that in the case of *Ellington* v. *Cheney*, 9 *Geo.* 2, cited by Mr. Justice *Foster* in *Bodwic* v. *Fennell* (*a*), it was held, that a custom to exclude foreigners was good, and that a by-law with a reasonable penalty to support such custom is good, where the penalty is given to the corporation or guild. A by-law was made, that if a person should follow the trade, not being free, he should forfeit a certain penalty, to be recovered by the master of the guild. The master brought the action, and the judgment was affirmed on a writ of error; and if the penalty could be paid to the master, who was the head of the company, why should it not be good if it was to be paid to the master and wardens, who are the two head integral parts of the corporation? And in the case of *The Master, Wardens, and Commonalty of Feltmakers* v. *Davis* (*b*), the master, wardens, and assistants had a power by the charter to make by-laws. A by-law was made, imposing a penalty upon any person who refused to take upon himself the office of renter-warden, to be paid to the master and wardens for the time being, for the use of the master and wardens and company. The first count stated every thing

(*a*) 1 Wils. 235. (*b*) 1 B. & P. 98.

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specially; the second was general, and specially demurred to; and one of the grounds of demurrer was, that the forfeiture is stated to have been incurred to the master and wardens; whereas the master and wardens are not the plaintiffs in the action. Lord Chief Justice *Eyre*, in giving the judgment of the Court, says, "The forfeiture in question is to be paid to the master, wardens, and company. If the by-law is badly framed, it is the fault of those who framed it. If they have chosen to empower their master and wardens to sue, the Court cannot look any further. No regulation with respect to the payment of the money by them to any other person will vary the right of action. The master and wardens may bring the action, and apply the money to the use of the company; they may sue in the same manner as the chamberlain of London does for the corporation of London, and they would probably declare both in their natural and official capacities." The count was held bad for this amongst other objections. It does not appear from the report whether the charter empowering by-laws stated that the master, wardens, and commonalty should have the fines, as in the case now before us: however, the Court of Common Pleas do not say that the by-law is bad by directing the penalty to be paid to the master and wardens; and taking all these authorities together we are not prepared to say that the by-law now under consideration is bad for directing the penalty to be paid to the master and wardens, for the use of the master, wardens and company. Then supposing there be no objection to the by-law itself, the next question is, is the action well brought in the name of the present plaintiffs? The penalty is to be paid to the master and wardens *for the time being:* it may be asked what is the meaning of these words, is it to those who were master and wardens when the penalty was incurred, or those who were master and wardens when payment was endeavoured to be enforced? The 54 *Geo.* 3, c. 170, s. 8, enacts, that securities given for indemnifying the district or parish

as to bastard children, are to be vested in the overseers of the poor for the time being. And in the case of *Addey* v. *Woolley* (*a*), where an action was brought by the overseers of the poor, to whom a bond was given for indemnifying the parish, and the defendants pleaded that the plaintiffs were not overseers at the time of the commencement of the action, the plea was held good, and that the action could not be brought in the name of the overseers to whom the bond was given. We do not cite this case as an authority to shew that the present plaintiffs cannot maintain the action, but to shew what way the Court construed the words *for the time being*, which is "those who were such when the action was commenced." This case, however, is not within either the 54 *Geo.* 3, c. 170, or within the 59 *Geo.* 3, c. 12, s. 17, which has been referred to in the argument, in citing the case of *Doe* d. *Higgs* v. *Terry* (*b*), as those acts are confined to parish officers who are authorized by these respective statutes to sue and hold property as if they were corporations. In considering the effect of the decisions, that a by-law cannot reserve penalties to be paid to a stranger, they are some of them given to whoever will sue; but it may be said that masters and wardens are not to be considered in that light, but that they are integral parts of the corporation, and therefore may sue, and so perhaps they may while they fill that situation, but they were not so at the time of the action brought, and for any thing that appears, they did not then belong to the corporation in any character whatever, and may be strangers; and therefore if the by-law was so framed as to allow them to sue now, it would be authorizing persons who may be strangers to the corporation to sue for the penalty. It may be said they would be trustees for the corporation; but it is much more expedient that penalties should be sued for either by the corporation at large, or by persons who are connected with it, and not to allow persons who may stand in the relation

(*a*) 3 B. Moore, 21; *S. C.* 8 Taunt. 691.

(*b*) 4 A. & E. 274; *S. C.* 5 N. & M. 556.

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of trustees only, to have any thing to do with it. It may be said, however, that there was a right of action once vested in the plaintiffs by the defendant refusing to execute the office, and it may be compared to a bond given to the churchwardens and overseers to indemnify the parish, in which case, before the statute of 54 *Geo.* 3, the action would be brought in the name of the churchwardens and overseers to whom the bond was given, though they were out of office when the action was brought; but that case differs from this; in these parish bonds the defendant personally enters into a contract by bond with the churchwardens and overseers, by their individual names of *A. B.* and *C. D.*, &c., though they are also described as churchwardens and overseers; here, however, there is no contract, but the defendant is a wrong-doer, and subject to a penalty, not to be paid to the plaintiffs, or any other person by name, but to the master and wardens, in their character official and politic; their right to receive the money, or to bring an action on non-payment, only belongs to them in their official and politic character, and when that ceases, their right to receive the money and to bring an action ceases with it, and we are of opinion that they cannot maintain the present action, and that there must be judgment for the defendant. We give no opinion whether the corporation at large, or the present master and wardens, could maintain an action. According to the opinion of Lord Chief Justice *Eyre*, in delivering the judgment of the Court in *The Master &c. of Feltmakers* v. *Davis* (*a*), the corporation at large could not maintain it, and as to the present or any future master and wardens maintaining it, the objection seems to be, that to do so they must take in succession in the nature of a corporation. The chamberlain of the city of London is a special corporation sole for some purposes, and there is a custom in London that several things, in which he has acquired an interest, shall go to his successors, who have the same right to proceed upon them as he had; *Bird* v. *Wilford* (*b*),

(*a*) 1 B. & P. 98. (*b*) Cro. Eliz. 464.

where it was so held, and other cases were there cited as having been decided to the same effect; and so also in *Fulhwood's* case (*a*). It would, however, be very difficult to apply the same rule to the master and wardens of this company; and if the circumstances of this case are such, that the defendant is not now liable to anybody, it is the fault of the corporation, in not making the by-law conformable to the charter, or in not bringing their action earlier.

Judgment for the defendant.

(*a*) 4 Rep. 64 b.

The QUEEN *v.* The Justices of CAMBRIDGESHIRE.
The QUEEN *v.* The Justices of SALOP.
The QUEEN *v.* The Justices of GLOUCESTERSHIRE.

Saturday, December 1st.

The notice of application for an order of maintenance upon the putative father of a bastard child, under 4 & 5 *Will.* 4, c. 76, ss. 72, 73, must be signed by a majority of the parish officers, including the churchwardens.

IN the two former of these cases applications had been made to the Cambridgeshire quarter sessions, Michaelmas, 1836, and the Shrewsbury quarter sessions, Easter, 1837, for orders of maintenance upon the putative fathers of two bastard children, under the new Poor Law Act, 4 & 5 *Will.* 4, c. 76, s. 72. In each case the notice of application served upon the putative father was signed by the two overseers of each parish, but not by the churchwardens. An objection having been made to the notice on this ground, the justices at the respective quarter sessions dismissed the applications.

Rules nisi having been obtained for a mandamus in each case to receive and enter the application, cause was shewn against the first rule by *Gunning*, in Michaelmas term, 1837 (*b*), and it was supported by *Archbold;* and in last Trinity term (*c*), *Humfrey* was heard against and *Whateley* for the rule, in the second case.

(*b*) Nov. 13th, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*c*) June 14th, before Lord *Denman* C. J., *Littledale*, *Patteson* and *Williams* Js.

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The following were the arguments used against the rules:—The question is, whether, under section 73 of 4 & 5 *Will.* 4, c. 76, the churchwardens of a parish ought to sign the notice of application for an order of maintenance on the father of a bastard child, as well as the overseers. The words of the section are, that the application shall be "given under the hands of such overseers or guardians, to the person intended to be charged." Section 72 makes it discretionary on the overseers and guardians of any parish, or the guardians of any union in which such parish may be situate, to make an application to the sessions for an order on the putative father, but they do so at the risk of paying costs: it is therefore essential that the majority should consent to make the application. The word '*overseer*' is explained by the interpretation clause (section 109), to include "churchwardens, so far as they are authorized by law to act in the management or relief of the poor," and the 43 *Eliz.* c. 2, s. 1, expressly makes churchwardens overseers of the poor. So also 13 & 14 *Car.* 2, enables "churchwardens and overseers" to seize the goods of the putative father, where an order in bastardy had been obtained. In practice the parties who have always proceeded on the 13 & 14 *Car.* 2, c. 12, and the 49 *Geo.* 3, c. 68, have been the churchwardens and overseers, as appears by the precedents in 1 *Burn*'s Justice (edition by *D'Oyly* and *Williams*, 357, 399). The decisions in *Rex* v. *The Justices of Warwickshire* (*a*), and *Rex* v. *Justices of Derbyshire* (*b*), are also relied upon to shew that the signature of the majority of the officers empowered to sign is requisite, in affirmance of the principle laid down in *Rex* v. *Beeston* (*c*) and *Grindley* v. *Barker* (*d*).

Arguments in support of the rules:—There is no authority bearing distinctly upon the point, as *Rex* v. *Justices of Warwickshire* (*e*) was decided upon another section of the act

(*a*) 2 N. & P. 153.
(*b*) 1 N. & P. 703.
(*c*) 3 T. R. 592.
(*d*) 1 B. & P. 229.
(*e*) 2 N. & P. 153.

(section 81), where the words used are different. It is submitted that the interpretation clause (section 109) does not apply, because an application for an order of maintenance on the putative father of a bastard, has nothing to do with the management or relief of the poor, which a churchwarden is required by law to act in. It is true that the first Bastardy Act, 13 & 14 *Car.* 2, c. 12, s. 19, speaks of both "churchwardens and overseers," and that may account for the proceedings being generally taken by them jointly; but the 6 *Geo.* 2, c. 31, s. 1, and the 49 *Geo.* 3, c. 68, s. 2, mention overseers only, in the proceedings to be taken against the putative father. [*Humfrey* stated, that by 6 *Geo.* 2, c. 31, s. 1, application may be made to the justices by the overseers, or any one of them; but as churchwardens were included in the term under the 43 *Eliz.* c. 2, s. 1, virtute officii, they were enabled under that statute to make the application. *Patteson* J. cited *Rex* v. *The Justices of the North Riding of Yorkshire* (*a*).] The Court intimated that they would defer their judgment till after the argument in the following case.

Cur. adv. vult.

The Queen v. *The Justices of Gloucestershire.*

In *The Queen* v. *The Justices of Gloucestershire*, a similar application had been made to the Trinity quarter sessions, 1837, for an order on one *Thomas Halsey*. The notice of application was signed by three persons, two of whom were the overseers of the parish of Whitminster, and the other was a guardian of the same parish, which was a member of the Whitminster Union, elected under the 4 & 5 *Will.* 4, c. 76; but it also appeared that there were two acting churchwardens for the parish. It was also stated in the affidavit against the rule, that the poor laws in the parish had always, up to the formation of the union, been administered by two churchwardens and two overseers, and never by a guardian, under the 22 *Geo.* 3, c. 83, or any other statute; and that the Board of Guardians had always been con-

(*a*) 2 N. & P. 103.

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ducted according to the regulations issued by the Poor Law Commissioners, contained in their first annual report, and especially with those numbered 6 and 2 (*a*). The sessions dismissed the application, on the ground that such notice had not been given as was required by the act. A rule for a mandamus having been obtained as in the above cases,

W. J. Alexander and *Cripps* shewed cause in Michaelmas term last (*b*). Section 72 enacts, that in cases of this kind, "the overseers or guardians of a parish, or the guardians of any union in which a parish may be situate," may make an application to the sessions for an order on the putative father. It may be strongly contended on those words that, when a parish is in a union under the act, the guardians only ought to apply, and that the former words are meant to include parishes with guardians under local acts. For if this be not so, a party might be harrassed with a double set of notices, which would be very vexatious. When a parish is included in a union, section 54 of the Poor Law Act takes away all power of relieving (except in special cases) from the overseers, and vests it solely in the guardians; now it cannot be denied that the application for an order of maintenance is connected with the relief of the poor, and therefore the overseers are excluded by that section from any interference in the matter. If this be so, then section 73, which directs the application to be under the hands of "such overseers or guardians," must be taken distributively; and if so, the notice is bad as being signed by only one guardian, whereas the orders of the Poor Law Commissioners make no act of the guardians valid unless when three concur. But if the overseers may apply con-

(*a*) Another objection was taken to the notice, both at the sessions and on this argument, that the service of it having been on the wife of the party charged was bad. It was sworn to on one side and denied on the other, that the party kept out of the way to avoid service, but the Court did not give any judgment on the point.

(*b*) Nov. 12th and 13th, before Lord *Denman* C.J., *Patteson*, *Williams* and *Coleridge* Js.

currently with the guardians, then the churchwardens ought to sign the notice also. Section 109 is conclusive on this point. In *Rex* v. *The Justices of Lancashire* (*a*), where an appeal was given by the 18 *Geo.* 3, c. 19, s. 4, "to the overseer or overseers," the Court decided that the majority of overseers must concur in the appeal. In *Rex* v. *The Justices of Warwickshire* (*b*), and *Rex* v. *The Justices of Derbyshire* (*c*), the same principle was affirmed.

Sir *J. Campbell* A. G., contrà. It has been contended, first, that, where a parish is in a union, the overseers have no power to apply for an order on a putative father. But this construction is diametrically opposed to the words of sect. 72, and is most unreasonable: for the maintenance of a bastard child is a burden on the parish, not on the union; and for all parochial matters the powers of overseers continue as they were.

With regard to the vexatiousness of notices from two sets of officers, the argument may be used on all occasions where two parties are allowed to proceed. But, as in other cases, whichever party gave the first notice would alone be entitled to have their application heard.

Secondly, as to the necessity of the majority of the parish officers signing the notice. It is conceded that, where a number of trustees are appointed to do a thing, a majority must concur; but sect. 73 does not require the churchwardens to interpose at all; or, if "overseers" in that section do include churchwardens, it is not necessary that the latter should sign the notice. If they concur in it, it is sufficient; and that is matter of evidence for the sessions. That was the effect of the decision in *Rex* v. *The Justices of Lancashire* (*d*), for that case did not decide that the majority should sign the appeal, but it appeared in evidence that the majority of the overseers dissented from the appeal. Without sect. 109

(*a*) 5 B. & Ald. 755.
(*b*) 6 A. & E. 873; *S. C.* 2 N. & P. 153.
(*c*) 6 A. & E. 885; *S. C.* 1 N. & P. 703.
(*d*) 5 B. & Ald. 755.

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it could not be contended that churchwardens need sign the notice mentioned in sect. 73; and the question for the Court is, how far they will apply the interpretation clause. It is true that for some purposes in the act the term "overseers" may mean churchwardens; but it does not in sect. 73. It might also be contended that it includes assistant overseer, or any subordinate officer engaged under any of the Poor Law Acts: but *Rex* v. *The Justices of the North Riding of Yorkshire* (*a*) decides that an assistant overseer need not sign. In many parishes there is a division into districts, having separate overseers, with which the churchwardens, who are appointed for the whole parish, have no concern; and therefore it would be highly inconvenient to hold that churchwardens are comprehended in the term "overseers." At all events, the signature of the majority of the parish officers, whoever those officers are, is not required. [*Coleridge* J. The objection is based on the words of sect. 73, that the notice shall be given *under the hands* of such overseers or guardians.] Still, the signature of the majority is not essential; one might sign for the others, being authorized by them. [Lord *Denman* C. J. Surely that cannot be so; the party served with a notice ought to see on the face of it whether it is well signed.] All that is required is, that the majority should concur.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—In each of these cases application was made for a mandamus to enter continuances and hear an appeal in bastardy, the Court of Quarter Sessions having refused to entertain it for the same objection to the notice given to the putative father, viz. that it was not signed by either churchwarden, but only by the two overseers appointed by the justices of the peace.

The 73rd section of the Poor Law Amendment Act contains an express proviso that no such application shall be

(*a*) 6 A. & E. 863; *S. C.* 2 N. & P. 103.

heard at the sessions unless "notice shall have been given under the hands of *such* overseers or guardians," and the reference is to the preceding clause, which empowers *the overseers* or guardians of the parish likely to be burthened to apply to the sessions for relief. It is admitted that of those who are by law required to give the notice, the majority must appear to have concurred in it by signing the notice itself; and the stat. 43 *Eliz.* constitutes the churchwardens overseers. But the maintenance of bastard children is said not to be a matter connected with the relief of the poor—an assertion on the face of it untenable, as the inability of the mother to support her child, and the consequent necessity of calling on the parish to do so, are the very foundation of the proceeding. A difficulty is raised from the interpretation clause, which enumerates all such persons as shall be meant and included in the term 'overseer,' wherever it occurs in the act. Those persons are "overseers of the poor, churchwardens so far as they are authorized or required by law to act in the management or relief of the poor, or in the collection or distribution of the poor-rate, assistant overseer," and all subordinate persons employed in the relief of the poor: and it is argued that the legislature could not intend the majority of this indefinite and fluctuating body to concur in giving the notice. The argument goes rather to shew the inconvenience of requiring the majority to act, than to determine whether a churchwarden is an overseer,—the real question in these cases.

But we apprehend that an interpretation clause is not to receive so rigid a construction; that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term where the circumstances require that they should.

We cannot however refrain from expressing a serious doubt whether interpretation clauses of so extensive a range will not rather embarrass the courts in their decision, than

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afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy, and the application of them to particular cases may give rise to endless doubts. In the present instance we are convinced that the 109th section did not mean to make it necessary for a notice under the 73rd to be signed by others than are required by the 72nd, which merely requires that a majority of the overseers, in the ordinary sense of the word, should concur in signing it. We mean of course the substantial householders, two at least in number to be appointed by the justices of the peace whom the 43 *Eliz.* associate with the churchwardens, declaring all to be overseers of the poor. A notice therefore signed by the former class alone is bad; the sessions were justified in dismissing a proceeding founded on such notice; and these several rules for writs of mandamus must be discharged.

Rules discharged.

Monday, December 3d.

EVANS *v.* JAMES ELLIOTT, SAMUEL ELLIOTT and another.

Where a lease is granted by a mortgagor after the date of the mortgage, notice by the mortgagee to the tenant to pay the rent, does not constitute a tenancy between the mortgagee and tenant, so as to enable the mortgagee to distrain for rent arrear after the notice: and where after notice the mortgagee distrained for half a year's rent due Lady-day, 1833, and rent was paid by the tenant subsequently to the distress:—Held, that this did not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for the rent due previously.

REPLEVIN for taking the plaintiff's cattle, in a certain place called &c., on the 13th November, 1834. The defendants avowed, first, under a demise to the plaintiff by one *Samuel Elliott*, now deceased, at a certain yearly rent, and that half a year's rent being due on 29th September, 1832, the defendants, as executors of the said *Samuel Elliott*, distrained the said cattle for rent arrear; secondly, that the plaintiff for two years, ending on the 29th September, 1834, held the said place in which &c., as tenant to the defendants, and justified as before. The plaintiff pleaded in bar to the first avowry, *riens in arrere*, to both

avowries *non tenuit*, and secondly, to the second avowry a tender.

The defendant took issue on the two first pleas in bar, and demurred to the last plea.

At the trial at the Breconshire summer assizes, 1836, before Lord *Denman* C. J., the plaintiff proved that a Mr. *Philip Elliott* had demised the farm in question, through his agent *Vaughan*, in 1830, to the plaintiff, for a term of eleven years, at a rent of 55*l.* per annum, payable half-yearly. The plaintiff paid his rent up to Michaelmas, 1832, to *Vaughan*, as *Philip Elliott*'s agent. In August, 1833, the defendants' testator distrained upon the plaintiff for half a year's rent, due on the Lady-day preceding, and the plaintiff paid him the rent, and continued to do so up to 1834, when he received the following receipt from the defendants' agent:

"Hereford, July 15, 1834.

"Received from Mr. *John Evans*, this day, the sum of 27*l.* 10*s.*, being the amount of the half-year's rent due to us the 25th March last.

"*B.* & Co."

In November, 1834, the defendants distrained for a year's rent, which gave rise to the present action. The year's rent claimed was for half a year due September, 1832, and for half a year due September, 1834.

The defendants proved a mortgage, by *Philip Elliott*, of the farm to their testator in 1827, and notice of the mortgage to the plaintiff on the 3d May, 1832.

It was contended for the plaintiff that, as the mortgagee had allowed the mortgagor to demise the farm to the plaintiff, payment of the rent by him to the mortgagor's agent at Michaelmas, 1832, entitled him to a verdict on the issue of riens in arrere, raised on the first avowry. It was further contended that, as the tenancy of the plaintiff to the mortgagor commenced after the date of the mortgage, and the rent in question grew due before any attornment to the mortgagee, there was no relation of landlord and tenant between them whereupon to found the power to distrain

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for the rent due September, 1832, and that therefore the plaintiff was also entitled to a verdict on the issue of non tenuit to the first avowry. The verdict passed for the defendants. *Chilton*, in Hilary term following, obtained a rule nisi to enter a verdict for the plaintiff on the two first issues; against which,

J. Evans and *Nicholls* shewed cause, in Hilary term last (*a*). It is now contended that no tenancy was created by the notice of the mortgage deed to the plaintiff in 1832, although rent was paid by him to the mortgagee after notice. The plaintiff, it is said, was a mere trespasser, and might have been turned out at any time by the mortgagee, and therefore could not be treated as a tenant. This view is founded on a *dictum* of *Patteson* J. in *Partington* v. *Woodcock* (*b*), but it is completely opposed to the decision in *Pope* v. *Biggs* (*c*). In that case the mortgagee was held entitled, after notice to the tenant, who held under a lease created after the mortgage, to all the rent accruing due after the notice. It is clear that in this case, as in *Pope* v. *Biggs* (*c*), the tenancy of the plaintiff was recognized by the defendants, and therefore the defendants were entitled to distrain. It is often said that the tenant of a mortgagor, where the demise is after the mortgage, may be treated as a trespasser, or as tenant. But he cannot be treated as a trespasser, so as to maintain a common action of trespass against him. *Birch* v. *Wright* (*d*) shews that, until notice of the mortgagee's title, the tenant has a perfect legal right in the demised premises; and although it appears from *Doe* v. *Cadwallader* (*e*) that a mortgagor or his tenant may be treated as a trespasser by the mortgagee, yet *Doe* v. *Hales* (*f*) proves that, if the mortgagee once recognizes the mortgagor's tenant as tenant, he cannot afterwards treat him as a trespasser.

(*a*) Jan. 27, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(*b*) 5 N. & M. 672.

(*c*) 9 B. & C. 245; *S. C.* 4 Mann. & R. 193.

(*d*) 1 T. R. 378.

(*e*) 2 B. & Ad. 473.

(*f*) 7 Bing. 322.

[*Coleridge* J. Must not you go further, and prove not only that the plaintiff was not a trespasser, but that he was a tenant at a rent certain, in order to authorize you to distrain?] The recognition of him as tenant and receipt of rent established the terms under which he held. [*Coleridge* J. You must shew that the tenant acceded to those terms; a recognition on one side is not sufficient.] The continuance in possession, and payment of rent by the tenant, proves that. [*Coleridge* J. It does so after the payment of rent, but the question is, whether it does so before any rent is paid?] In *Keech* v. *Hall* (*a*), Lord *Mansfield* C. J. intimated that the mortgagee might adopt the lease granted by the mortgagor, for the true character of the mortgagor in possession is that of agent or bailiff to the mortgagee, as was laid down by *Parke* J. in *Pope* v. *Biggs* (*b*). *Waddilove* v. *Barnett* (*c*) completely confirms *Pope* v. *Biggs* (*b*). The 4 *Ann.* c. 16, having rendered attornment no longer necessary, the notice of the title of the mortgagee and payment of rent, produce the same relation between the landlord and the party in possession that attornment would before the statute. This was clearly considered to be the law in *Vallance* v. *Savage* (*d*), where *Pope* v. *Biggs* (*b*) was relied upon. *Partington* v. *Woodcock* (*e*) will be relied on by the other side, but it does not resemble the present case. It is more like *Webb* v. *Russell* (*f*). *Rogers* v. *Humphreys* (*g*) is a late case, in which the relation between mortgagor and mortgagee was much considered, and in which the Court expressly said that, if the mortgagee accepts the rent from a tenant under a lease made subsequent to the mortgage, the relation of landlord and tenant is created between them. [*Littledale* J. There is this difficulty, if you consider the mortgagor as the agent of the mortgagee, so that he may

(*a*) 1 Dougl. 21.
(*b*) 9 B. & C. 258; *S. C.* 4 Mann. & R. 193.
(*c*) 2 Bing. N. C. 538.
(*d*) 7 Bing. 595.
(*e*) 5 N. & M. 672.
(*f*) 3 T. R. 393.
(*g*) 4 A. & E. 299; *S. C.* 5 N. & M. 511.

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make contracts for the latter, the mortgagee would be bound by his acts as in other cases of principal and agent; but that is not so, for the mortgagee is certainly at liberty to set aside the lease created by the mortgagor.] The relation between mortgagor and mortgagee is *sui generis*, and cannot be compared to any other, in all respects. Since the decision of *Keech* v. *Hall* (*a*), it may be conceded that the mortgagee has a right to treat the tenant as a trespasser, if his interest did not commence till after the mortgage.

Sir *W. W. Follett*, *Chilton*, and *E. V. Williams*, contrà. The question is, whether, where there is a lease created by the mortgagor after the mortgage, and the mortgagee gives the tenant notice of the mortgage, a tenancy is thereby necessarily created between them, so as to authorize a distress. All the difficulty in the case arises from mixing up the legal and equitable rights of the parties. Where the mortgagor makes a lease, he has no legal interest at all; still the tenant knows nothing of the mortgage, and pays rent to him. The mortgagee, without doubt, has got the whole legal interest vested in him. Then what is his position as regards the tenant? The cases shew that he may undoubtedly treat him as a trespasser, and bring ejectment against him without notice. On this point all the cases concur, from *Keech* v. *Hall* (*a*) down to *Doe* v. *Cadwallader* (*b*). But it is said that, although the tenant may be treated as a trespasser, the mortgagee has the option to treat him as a tenant; that he has only to give him notice, and then that the other party, without any acquiescence or assent, at once becomes his tenant. What sort of a tenancy is created? Is it a tenancy from the time of notice, or from the preceding quarter-day. Suppose the mortgagor had created a lease for twenty-one years, it cannot be contended that the mortgagee would be bound by the covenants

(*a*) 1 Dougl. 21. (*b*) 2 B. & Ad. 473.

in the lease; if the tenant was to be considered a tenant from year to year, and he held under the same covenants in the lease, the burden of those covenants would then attach to the mortgagee. Suppose, again, the tenancy was created by parol, what difference can there be? It is not denied that the mortgagee, by his acts with the tenant, may create a new tenancy. But that stands on a different footing, viz. on the express agreement. If this were an action for use and occupation the case might be different, but it is founded on a distress for rent, where it is necessary to prove a tenancy at a certain rent, payable on fixed days. *Moss* v. *Gallimore* (*a*) has been cited, but it is not like the present case; there the lease was before the mortgage, and it is a case to which the 4 *Ann.* c. 16, applies; for before that statute, attornment from the tenant would have been necessary. It was held there, that the mortgagee, after giving notice to the tenant, was entitled to the rents in arrear, and might distrain for future rent. But it was essential there for the mortgagee to give notice, otherwise the tenant would have been justified in paying rent to the mortgagor. But there is no authority to shew that a mortgagee, without notice to the tenant, or acquiescence by him, could distrain or treat the tenant as tenant. *Pope* v. *Biggs* (*b*) is the case relied upon by the other side, but that case, if it can be supported, only decided that the assignee of a mortgagor cannot recover rents from his tenants which they have paid over to the mortgagee after notice. It is true that *Bayley* J. laid down that "the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents," which, if it be good law, would go far to decide this case. But it clearly is not, for the learned judge goes on to give his reasons, and after stating that a lessee cannot dispute his landlord's title, but is at full liberty to shew that the lessor's title has been put an end to, he cites *Keech* v.

(*a*) 1 Dougl. 279.

(*b*) 9 B. & C. 258; *S. C.* 4 Mann. & R. 193.

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Hall (*a*) as shewing that where a lease has been granted by a mortgagor after the mortgage, and the mortgagee has suffered the mortgagor to continue in possession, though the lessee is not entitled to say that the mortgagor never had any interest in the premises, he may say that he had a defeasible title. But the learned judge must have forgotten the facts of that case, which decided a different point. *Bayley* J. then proceeds to argue, that in such a case, if the tenant attorned to the mortgagee before the 4 *Ann.* c. 16, ss. 9, 10, or the mortgagee gave notice to the tenant after the statute, the mortgagee became at once entitled to the rents. But this doctrine cannot apply to cases where the lease was after the mortgage. In such a case no attornment was necessary; the mortgagor had no title to make a lease, and the tenant of course no interest in the premises. *Pope* v. *Biggs* (*b*) therefore is either misreported, or there was a misapprehension of the facts of the case. This is the only case which can be relied on as an authority for the plaintiff, for *Doe* v. *Hales* (*c*) only decides that when the mortgagee has recognized the tenant as legally in possession, he cannot bring ejectment on a demise dated prior to that period. Then there are direct authorities the other way. *Alchorne* v. *Gomme* (*d*) is distinct on the point. In *Rogers* v. *Humphreys* (*e*), which is the last case on the subject, Lord *Denman* C. J., in delivering the judgment of the Court, lays down the law as to the relation between the mortgagee and the tenant of the mortgagor, and after saying that the mortgagee may treat the tenant as a trespasser, points out that by certain acts between them the relation of landlord and tenant may be created, which is fully conceded. All the difficulty in these cases arises from the legal and equitable characters of the mortgagee being confounded. The land in equity is considered a mere pledge in the hands of the mortgagee, but in law he has got the whole legal

(*a*) 1 Dougl. 21.
(*b*) 9 B. & C. 245; *S. C.* 4 Mann. & R. 193.
(*c*) 7 Bing. 322.
(*d*) 2 Bing. 54.
(*e*) 4 A. & E. 299; *S. C.* 5 N. & M. 511.

interest. Then why should the Court engraft any of the equitable incidents upon his estate? It was the view of this principle in *Partington* v. *Woodcock* (*a*), that made *Patteson* J. observe that he never could understand how notice from the mortgagor could create a tenancy between him and the tenant. It is said that the mortgagor is the agent for the mortgagee, but that is inconsistent with the mode in which it is conceded that the mortgagee may treat the tenant. If the mortgagor were an agent, it is clear that all leases made by him would be valid. It is submitted, therefore, that although by agreement or acts between the mortgagee and tenant a new tenancy may be created, the mere facts of notice of the mortgage and payment of rent afterwards are not sufficient to constitute that relation.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was tried before me at the Brecon summer assizes, 1836. It was a case of replevin, the distress having been taken by a mortgagee, who had become such previously to the lease granted by the mortgagor to plaintiff. The mortgage money being unpaid, the mortgagee gave notice to the tenant to pay him the rent, and distrained on his refusal to do so. Stripped of some immaterial circumstances, the question was thus nakedly raised, whether the tenant of a mortgagor, by virtue of a lease posterior to the mortgage, becomes tenant to the mortgagee as soon as the latter gives him notice that there is a mortgage, and that the money has not been paid. On the authority of *Pope* v. *Biggs* (*b*), and *Waddilove* v. *Barnet* (*c*), I was of opinion at the trial that this question must be answered in the affirmative. And the language of some of the judges in the former case may be thought to warrant the opinion, though there the question was, whether payments were pro-

(*a*) 5 N. & M. 672.
(*b*) 9 B. & C. 245; *S. C.* 4 Mann. & R. 193.
(*c*) 2 Bing. N. C. 538.

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tected, not whether the relation of landlord and tenant arose. On hearing the case argued, and on more reflection, I am however now convinced that, by the mere fact of notice that the mortgage money remained unpaid, the mortgagee cannot forthwith cause the tenant to hold of the mortgagee. I am led to this conclusion by the injustice which I think would result from declaring that he possesses this privilege. As against the mortgagor, he might take possession the moment the condition is broken, but if he chooses to permit him to retain possession, and to lease the premises, as owner, I think he cannot afterwards tell the lessee that he was deceived, and that the mortgagor was not the owner. The tenant clearly cannot deny his lessor's title, or protect himself against him by paying his rent to any other person. Can the law then permit another to come forward and say, "I am the real owner, and that character was assumed by the mortgagor by my consent; while you thought you were dealing with him you were in fact dealing with me: for the rent you have already paid to him, I also claim the right to distrain." The tenant's attornment is at least necessary to create this relation, and we are all clearly of opinion that the subsequent attornment, which was proved in this case, cannot have the effect of setting up the mortgagee's title by relation from the period when notice was given. Thus far we are agreed, and the rule must be made absolute for a new trial. But it is proper to state, that the delay in giving our judgment has been occasioned, in a great degree, by my own doubt of the soundness of a doctrine which was strongly pressed upon the Court in argument, as the medium by which the result must be attained. This argument was, that the mortgagee may always treat both the mortgagor and all who claim under him as trespassers, and that for that reason the mortgagor's lessee cannot become the tenant of the mortgagee. My learned brothers are, I believe, disposed to assent to this proposition, which, generally speaking, is certainly not to be questioned. But for my own part, I wish to guard myself against being under-

stood to adopt it as universal. The contrary must, I think, be admitted, that a mortgagee may so bind himself by his own conduct, as to be precluded from treating the mortgagor's lessee as a trespasser. What conduct might amount to a recognition, seems to me to be rather matter of evidence than of law; but I confess that *Doe* v. *Hales* (*a*) appears to me, though doubted by my brother *Littledale* in *Doe* v. *Cadwallader* (*b*), to be well decided. I am by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold, from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage, and to lease them out exactly as if his property in them coutinued. The well known case of *Keech* v. *Hall* (*c*) is generally considered as an authority the other way; but Lord *Mansfield* was not there laying down the law upon the subject, so much as explaining his own view of the manner in which mortgagor and mortgagee commonly regard one another in fact. I must add, that some misconception may have arisen on this subject, from the care the Courts have employed in correcting an acknowledged error of the same great judge—the error of supposing that the right to recover in ejectment could depend on any thing but the legal right of possession. This most frequently follows the legal estate, though Lord *Mansfield* was disposed in some cases to transfer it to him in whom no more than an equitable title was vested. A strong assertion of the right of the mortgagee in such a case against the mortgagor, may have led to the notion, that as against the former, not only the latter, but all claiming under him, must be wrong-doers, without adverting to the possibility of the right of possession being recognized in another by the person enjoying the legal estate.

Rule absolute.

(*a*) 7 Bing. 322. (*b*) 2 B. & Ad. 473. (*c*) 1 Dougl. 21.

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Saturday, December 6th.

HUTCHINSON and another, Assignees of HUNT, *v.* HEYWORTH and others.

ASSUMPSIT for money had and received. Pleas:—1, non-assumpsit: 2, payment before action brought: 3, payment of money into Court. At the trial before Lord *Abinger* C. B., at the Liverpool summer assizes, 1835, a verdict was found for the plaintiffs, damages 5000*l.*, subject to the opinion of this Court upon the following case.

The action was brought by the plaintiffs as the assignees of *William Hunt*, a bankrupt, to recover the sum of 5000*l.* and interest, under the following circumstances. The bankrupt, *William Hunt*, is the surviving partner of the firm of Messrs. *Hunt* & *Jenkinson*, woollen manufacturers, at Rochdale. Defendants are commission merchants and agents at Liverpool, under the firm of *Ormerod, Heyworth* & Co. For many years preceding the bankruptcy of *Hunt*, the firm of *Hunt* & *Jenkinson* had been in the habit of consigning their manufactured goods, through the defendants, to certain mercantile establishments in America, which are mentioned in the letters hereafter set out, and which had been recommended to them by the defendants, for sale on account of *Hunt* & *Jenkinson*, and to a very large amount; and by the course of dealing between the parties, Messrs. *Ormerod, Heyworth* & Co. made advances to *Hunt* & *Jen-*

1. The following letter, sent to the holders of the fund out of which payment is to be made, does not require a bill stamp:—"We now authorize you to pay to Messrs. *R.* & Co. (having revoked the former order in their favour), after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of said shipments, provided the same shall not exceed the sum of 5000*l.* *H.* & *J.*"

2. The defendants carried on business as a commission house at Liverpool, and were connected with several houses abroad in which they were partners, but the foreign partners were not partners in the Liverpool house. *H.* & *J.* were in the habit of consigning goods to the defendants, to be sent abroad to their foreign houses for sale, and the proceeds were remitted to the defendants on account of *H.* & *J.* *H.* & *J.* being indebted to *R.* & Co., wrote the above letter to the defendants; on which the defendants wrote to *R.* & Co., stating they would pay the money accordingly on receiving their guarantee, which *R.* & Co. thereupon gave. Before the proceeds were received by the defendants, *H.* & *J.* became bankrupts, and their assignees gave the defendants notice not to pay any thing on account of the bankrupts:—Held, on the goods being afterwards received and sold by the defendants, that the proceeds were not recoverable by the assignees, as the letter of *H.* & *J.* contained a specific appropriation or an equitable assignment to *R.* & Co., which was not revocable by the bankrupts or their assignees.

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kinson upon such consignments, and the proceeds of the sales were to be remitted by the said foreign houses to defendants in Liverpool, on account of and as the agents of *Hunt* & *Jenkinson*, and the defendants were to account for the same to *Hunt* & *Jenkinson*, after repaying themselves thereout their commission, advances and other charges. The defendants were partners in each of those foreign establishments, but the foreign partners in those foreign houses were not partners in the house of *Ormerod, Heyworth* & Co. This course of dealing continued for a period of upwards of twelve years, the proceeds of all sales being regularly remitted to defendants, who regularly advised *Hunt* & *Jenkinson* thereof, and placed the same to their credit, or paid over the amount as circumstances required, and defendants made up and balanced, and regularly transmitted to *Hunt* & *Jenkinson*, and to *Hunt* after *Jenkinson*'s death, and to the plaintiffs after *Hunt*'s bankruptcy, their accounts current of all the said transactions half-yearly, up to every 30th June and 31st December, which have been regularly approved of, except as to the sum of 5000*l.* in question and interest thereon. No consignments were made after 30th September, 1831. At that time the amount of *Hunt* & *Jenkinson*'s goods, shipped abroad through the defendants and unsold, was from 39,000*l.* to 40,000*l.*, and the amount of remittances received by the defendants subsequent to September, 1831, on account of consignments previous thereto, is about 43,500*l.* *Hunt* & *Jenkinson* were at that time indebted to the defendants in a large sum, for advances in anticipation of sales, and for commissions and charges. *Hunt* & *Jenkinson* had also then become indebted in upwards of 5000*l.* to Messrs. *Clements, Royds* & Co., of Rochdale, their bankers, which debt remained unsatisfied until the time of the payment of 5000*l.* to the said *Clements, Royds* & Co. as hereinafter mentioned. On the 23rd September, 1831, *Hunt* & *Jenkinson*, being so indebted as aforesaid, wrote the following letter to the defendants:—

" Liverpool, September 23rd, 1831.

Messrs. *Ormerod, Heyworth* & Co.

Gentlemen—We hereby give you authority to pay to Messrs. *Royds* & Co., bankers, Rochdale, after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments up to the present date, one half of the remainder of the proceeds of said shipments.

We remain, Gentlemen, your most obedient servants,

Hunt & *Jenkinson*."

In answer to which the defendants on the same day sent to *Hunt* & *Jenkinson* the following, inclosed in another letter:

" Messrs. *Royds* & Co., Bankers, Rochdale.

Gentlemen—We have this day received an authority from Messrs. *Hunt* & *Jenkinson* to pay you, after we have liquidated the balance they owe to us, from the first proceeds of their shipments to our foreign establishments up to the present date, one half of the remainder of the proceeds of the said shipments, which at a moderate estimate we think will amount to about 4700*l*. This authority we engage to comply with on the condition of your guaranteeing us from any claim which may be made on us by any other party in consequence of such payment having been made to you. We remain, Gentlemen, very respectfully,

Your most obedient Servants,

Ormerod, Heyworth & Co."

On the 28th September, 1831, *Hunt* & *Jenkinson* sent the following letter to the defendants:—

" Liverpool, September 28th, 1831.

Messrs. *Ormerod, Heyworth* & Co.

Gentlemen—Your letter to Messrs. *Royds* & Co., of the 23rd instant, inclosed in yours of the same date, we did not present to them, thinking it would not be satisfactory, and having returned to you the same, we now authorize you to pay to Messrs. *Royds* & Co. (having revoked the former order in their favour), after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of said shipments, provided the same shall not exceed the sum of 5000*l*. We remain, Gentlemen,

Your most obedient Servants,

Hunt & *Jenkinson*."

The defendants on the same day wrote the following letter to Messrs. *Clements, Royds* & Co.:—

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"Liverpool, 28th September, 1831.

Messrs. *Royds* & Co.

Gentlemen—We refer to ours of the 23rd instant, which has been returned to us by Messrs. *Hunt* & *Jenkinson*, not being satisfactory to them, which we now revoke. We therefore now, agreeably with their authority, engage to pay you, after we have liquidated the balance they owe to us, from the first proceeds of their shipments to our foreign establishments up to the present date, *a proportion of the remainder of such proceeds as may come into our possession*, which we expect will be to a considerable amount, *so as not to exceed the sum of* 5000*l.*, in *consideration of your guaranteeing* us from any claim which may be made on us by any other party in consequence of such payment having been made to you.

We remain, Gentlemen, very respectfully,
Your most obedient Servants,
Ormerod, Heyworth & Co."

And received the following answer from *Clements, Royds* & Co.:—

"Messrs. *Ormerod, Heyworth* & Co.

Gentlemen—Understanding from our friends, Messrs. *Hunt* & *Jenkinson*, that you have agreed to pay over to us one *half of any surplus* arising from the proceeds of goods consigned to your foreign establishment, up to this date, after liquidating your claims against them, we hereby agree to guarantee you from any claim which may be made on you from any other party in consequence of such payments.

Clements, Royds & Co."

"Rochdale, 30th Sept. 1831."

At the trial the above letters of Messrs. *Hunt* & *Jenkinson*, the defendants, were produced to shew the authority of Messrs. *Hunt* & *Jenkinson*, and were objected to as not being stamped with proper stamps, the only stamp being an agreement stamp of 1*l.* 15*s.* on the letter of the 28th September, 1831, for all the letters. This point was reserved by his lordship.

In February, 1833, Mr. *Hunt*, the surviving partner, committed an act of bankruptcy, and on the 7th March, 1833, the fiat in bankruptcy issued, under which *Hunt* was declared bankrupt, and the plaintiffs were chosen assignees. Afterwards, on the 15th April following, the plaintiffs served a notice on the defendants not to make any payments out of the bankrupt's effects, then in their hands or possession, or which might thereafter come in their hands or posses-

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sion, to the said Messrs. *Clements, Royds* & Co., or to any one else but themselves, the plaintiffs. The defendants, however, subsequently, in pursuance of the alleged authority and engagement contained in the letters above stated, paid to *Clements, Royds* & Co. the sum of 5000*l.*, which had been received by the defendants after the service of the above notice. The defendants have paid the plaintiffs and paid into Court, under the plea for that purpose in the cause, all the proceeds of the consignments received by them, excepting that sum, which does not exceed one half of the remainder of those proceeds, after satisfying the defendants the balance due to them at the time of the bankruptcy, which was liquidated prior to the receipt by the defendants of any part of that 5000*l.* The payment into Court also covered the plaintiff's claim for interest on the 5000*l.* The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the above sum of 5000*l.* under the circumstances stated. If the opinion of the Court is in the affirmative, the verdict is to stand for the plaintiffs; if in the negative, a nonsuit is to be entered.

First point: The letter of the 28th Sept. not admissible in evidence, for want of the proper stamp.

Cresswell (with whom was *Cowling*) argued the case for the plaintiffs in Easter term last (*a*). The plaintiffs, as the assignees of the bankrupt, are entitled to the sum of 5000*l.*, if the document by which the money was directed to be paid to *Royds* & Co. was not admissible in evidence. It clearly was not admissible in evidence; for it amounted to an order "to pay a sum of money out of a particular fund, which might or might not be available" (*b*), and therefore should have been stamped as a bill of exchange: *Emly* v. *Collins* (*c*), *Firbank* v. *Bell* (*d*), *Butts* v. *Swann* (*e*). Where a bill of exchange is made for an indefinite sum, but the utmost amount made payable is expressed, the limitation fixes

(*a*) May 1st, before Lord *Denman* C.J., *Littledale, Patteson,* and *Coleridge,* Js.

(*b*) 55 *Geo.* 3, c. 184, schedule, part 1.

(*c*) 6 Maule & S. 144.

(*d*) 1 B. & Ald. 36.

(*e*) 2 B. & B. 78.

the amount of stamp. In this case the stamp should have been for 5000*l.* In *Jones* v. *Simpson* (*a*) it was held the instrument required no bill or draft stamp, because the sum to be paid could not be determined. [*Littledale* J. This does not appear to be an order payable to the defendants for the payee, within the words of the statute. To constitute it a bill of exchange, it should be an order to a party to pay money in his hands, or coming to his hands, to a third party.] This does so. The facts are, that *Hunt* & *Jenkinson* wrote to the defendants on the 23rd September, and again on the 28th, with an order, upon a particular fund, in favour of *Royds* & Co., and the defendants consent to accept the order. Do they not then hold the order as the agents of *Royds* & Co., or, in the words of the statute, on behalf of the payee? [*Littledale* J. When a thing is delivered to *A.* for the use of *B.*, it does not belong to *A.*, but he is bound to hand it over to *B* (*b*). Here the order upon the defendants was never intended to be handed over to *Royds* & Co., but they were entitled to retain it themselves as their voucher.] *Royds* & Co. were the parties beneficially interested in the order, and it is submitted that the defendants could only hold the order in their behalf. Suppose it had been a bill of exchange in the usual form, and the defendants had written to *Royds* & Co. to say they had received a bill in their favour, which they (the defendants) would accept, what right could the defendants have to retain that bill? Then how is that distinguishable from the present case?

Second point: The order was revoked by the bankruptcy.

II. But supposing this letter of 28th September not to amount to a bill of exchange, but to be a simple authority to pay over money, it is revoked by the bankruptcy. The fiat in bankruptcy was on the 7th March, and notice was given to the defendants not to make any payments out of the bankrupt's effects on the 15th April. The proceeds were not received by the defendants till after this notice.

(*a*) 2 B. & C. 318; *S. C.* 3 D. & R. 545.

(*b*) See *Evans* v. *Marlett*, 1 Ld. Raym. 271.

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The defendants are partners in the foreign houses, but the partners in the foreign houses are not partners in the Liverpool house, and therefore the possession of the foreign houses is not the possession of the defendants. There cannot therefore be said to have been a specific appropriation of this sum of money, for the foreign houses, in whose possession it was, knew nothing of it. There was no new consideration to *Hunt* & *Jenkinson* for this order, and it formed no part of the original transaction out of which the debt to *Royds* & Co. arose. This distinguishes the transaction from all the cases in which it has been held that a specific appropriation could not be revoked. Thus, in *Fisher* v. *Miller* (*a*), where the plaintiff, for the purpose of sale, consigned a cargo of fish to the defendant, and the plaintiff, being in want of a sum of 500*l.*, induced a Mr. *M'Intosh* to advance it, on the promise that the defendant should remit to *M'Intosh* the proceeds of the cargo: the plaintiff afterwards wrote to the defendant to revoke the order to pay the proceeds to *M'Intosh;* but the Court held there had been a specific appropriation. But there 500*l.* may be considered to have been actually paid for the fish, and that was the ground of the judgment of the Court. The same point was the ground of decision in *Bradbury* v. *Anderton* (*b*). There is a class of cases where a debt has been held to be well assigned: for instance, where *A.* is indebted to *B.*, and *B.* is also indebted to *C.*, if *B.* desire *A.* to pay his debt to *C.*, and *A.* consents, then *B.* will be discharged of his debt: *Fairlie* v. *Denton* (*c*). But then several ingredients are required: first, there must be a defined and ascertained debt due, to be assigned; second, the debtor must be discharged from the debt: neither of which circumstances occurred here, for there was no debt due from the defendants to *Hunt* & *Jenkinson* to be assigned, and if there was, *Hunt* & *Jenkinson* were certainly not dis-

(*a*) 1 Bing. 150; *S. C.* 7 B. Moore, 597.

(*b*) 1 C., M. & R. 486.

(*c*) 8 B. & C. 395; *S. C.* 2 Mann. & R. 353. And see *Tatlock* v. *Harris*, 3 T. R. 180.

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charged of their debt to *Royds* & Co.; as the defendants would only consent to make the promise to pay *Royds* & Co. on receiving their guarantee. *Hunt* & *Jenkinson* therefore might have been sued by *Royds* & Co. the next day. The class of cases therefore to which *Curon* v. *Chadley* (*a*), *Israel* v. *Douglas* (*b*), and *Scott* v. *Porcher* (*c*), belong, are not applicable. If the defendants had become responsible to *Royds* & Co. at the request of *Hunt* & *Jenkinson*, the argument might have been sustainable; but it is clear that the defendants only paid on the faith of the guarantee of *Royds* & Co. The order therefore was revoked by the bankruptcy, and the money received by the defendants was received to the use of the assignees. If the goods of the bankrupt had not been converted into money at the time of the bankruptcy, it is clear that they would have passed to the assignees. So also if they had been converted into money abroad whilst in the hands of the foreign houses. But it will be contended that this was an equitable assignment of the fund, on the authority of *Hunt* v. *Mortimer* (*d*). But that was a very different case; for there the defendant advanced money to the bankrupt on the security of the ensuing payment by the East India Company to the bankrupt being made to himself. The earliest case on the subject is *Row* v *Dawson* (*e*), where there was an order to pay a sum out of a particular fund; and it was held binding. But how can it be said that there was an assignment of any thing specific here, where nothing at all is particularized? The question of equitable assignment was very much considered in *Carvalho* v. *Burn* (*f*); and it was held there, under very similar circumstances, that the order in question did not operate as an equitable assignment.

Crompton, contrà. I. The letter of September 28th, First point.

(*a*) 3 B. & C. 591; *S. C.* 5 D. & R. 417.
(*b*) 1 H. Bl. 239.
(*c*) 3 Mer. 652.
(*d*) 10 B. & C. 44: *S. C.* 5 Mann. & R. 12.
(*e*) 1 Ves. sen. 331.
(*f*) 4 B. & Ad. 382; *S. C.* (in error), 1 A. & E. 883, and 1 N. & M. 700; in equity, 7 Sim. 109.

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did not require a bill stamp. The origin of the clause in the 55 *Geo.* 3, c. 184, was, that it was found that instruments charging a particular fund were not bills of exchange, *Row* v. *Dawson* (*a*); and therefore this clause was framed to include them. But it never was intended that an instrument not payable to bearer or order, or delivered to the payee, should be considered as a bill of exchange. Negotiable instruments only were contemplated by the act. The Court cannot extend a clause which is a charge upon the subject, so as to include parties like the defendants under the terms "payee, or some other person on his behalf." The argument on the other side first makes out the defendants to be acceptors of the bill, and then to be agents for the payee. In fact they were neither one nor the other. The letter was sent to the defendants to keep, and it was their duty to keep it for their own security; it clearly therefore was not received by them on behalf of the payee. [*Littledale* J. Suppose a man were to write to his banker and direct him to pay 100*l.* to a third party, that could hardly be considered a bill of exchange. *Patteson* J. Even if *Royds* & Co. might have demanded the letter from the defendants, after they had consented to the terms of it, that does not settle the question, because they could not have demanded it without such assent, and to satisfy the words of the act the delivery must be at the time, to the payee or some one on his behalf.] In *Emly* v. *Collins* (*b*), the order to pay a specific sum of 200*l.* was given to an agent of the payee. So also in *Firbank* v. *Bell* (*c*), and *Butts* v. *Swann* (*d*), the sum was specified, and in those two cases it was payable to order, but in *Jones* v. *Simpson* (*e*), which is more like the present case, where the order was to pay a sum not ascertained, the Court held it was not a bill of exchange. *Crowfoot* v. *Gurney* (*f*) is also in point, to shew that this order does not require a bill stamp.

(*a*) 1 Ves. sen. 331.
(*b*) 6 Maule & S. 144.
(*c*) 1 B. & Ald. 36.
(*d*) 2 B. & B. 78.
(*e*) 2 B. & C. 318; *S. C.* 3 D. & R. 545.
(*f*) 9 Bing. 372.

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Second point.

II. The defendants received 5000*l.* to the use of *Royds* & Co., and were bound to pay it over to them. The letters set out in the case shew an agreement between three parties, *i. e.* the bankrupt, the defendants, and *Royds* & Co., by which the proceeds of certain cargoes of the bankrupt were to be paid to the defendants, and to be by them paid over to *Royds* & Co. The bankrupt assented to this, and good consideration, in the forbearance of *Royds* & Co. to sue, may be assumed. The defendants assented to pay the money over, and on their refusal an action would lie against them. If the bankrupt had revoked the order after this, it would have been a fraud, if not in law, certainly in equity; and if he could not revoke, his assignees could not; or, if either he or they could revoke, they never did. They allow the money to come into the defendants' hands, and then require it to be paid to them. But the money was bound in equity before it got into the hands of the defendants. This appears by the recent case of *Tibbitts* v. *George* (*a*); but when it did arrive it was money had and received to the use of *Royds* & Co. On what ground can it be contended that an action would not lie, or wherein does the case differ from *Williams* v. *Everett* (*b*) and *Yates* v. *Bell* (*c*), in which cases it was held that, if the defendants had consented to the appropriation of the money, and had communicated with the party in the situation of *Royds* & Co., indebitatus assumpsit might have been brought? But suppose even a special declaration framed against the defendants, that, in consideration of a certain cargo being consigned to them, they undertook to pay over the proceeds to *Royds* & Co., it would be sufficient to aver that the proceeds were realized by them. This therefore was clearly an equitable assignment. The doctrine of equitable assignment arises from the principle of law, that nothing, but what a bankrupt is equitably as well as legally entitled to, passes to his assignees; per *Parke* J., in *Hunt* v. *Mortimer* (*d*), *Vacher* v.

(*a*) 5 A. & E. 107; *S. C.* 6 N. & M. 804.

(*b*) 14 East, 582.

(*c*) 3 B. & Ald. 643.

(*d*) 10 B. & C. 44; *S. C.* 5 Mann. & R. 12.

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Cocks (*a*). This is illustrated by *Tibbitts* v. *George* (*l* where the insolvent, before her insolvency, had assigned l parol a debt due to her from *M.*, and it was held that th was an equitable assignment, and that the debt did n pass to her general assignee. That case, and *Ex par South* (*c*) also, shews that it is not necessary that tl holder of the fund should have notice of the appropriatio though if notice be necessary, there was notice here, f the case expressly finds that the defendants are partners i the foreign houses, and therefore notice to them would l notice to the latter. In *Hodgson* v. *Anderson* (*d*), whe the plaintiff had made an assignment of a debt and afte wards revoked it, the Court decided against his right to d so; and *Bayley* J. said, "There can be no doubt that creditor has a right to insist on payment to himself, or t such person as he thinks fit. Whether he can retract a order once given it is not necessary to decide, because I a of opinion that a creditor is not at liberty to withdraw th authority, provided there is a pledge by the person to whoi the authority is given, that he will make the payment accor ing to the authority." That is just the case here. *Fish* v. *Miller* (*e*) is also a strong authority for the defendant It was cited to shew that the appropriation was there mad in respect of the advance of 500*l.*, and not in respect of a antecedent debt; but that was not the distinction in *Carvalh* v. *Burn* (*f*), nor in *Tibbitts* v. *George* (*b*), but they proceede on a different ground, that an attempt to revoke an orde made in favour of a particular creditor was fraudulent. S in *Crowfoot* v. *Gurney* (*g*), where the bankrupt assigned th balance due to him by a letter to a creditor of his, it wa held to be an equitable assignment not revoked by the bank ruptcy, although the particular sum was not ascertained

(*a*) 1 B. & Ad. 152.
(*b*) 5 A. & E. 107; *S. C.* 6 N. & M. 804.
(*c*) 3 Swanst. 392.
(*d*) 3 B. & C. 842; *S. C.* 5 D. & R. 735.
(*e*) 1 Bing. 180.
(*f*) 4 B. & Ad. 382; *S. C.* (i error), 1 A. & E. 883, and 1 N & M. 700; in equity, 7 Sim. 109
(*g*) 9 Bing. 372.

In *Bailey* v. *Culverwell* (*a*), the bankrupt had purchased some skins, which he paid for by bill. The bill was dishonoured, and the bankrupt thereupon gave an order to the broker, who held the skins, to sell them, and apply the proceeds to payment of the bill. The broker did not sell the skins before the bankruptcy; but it was held that the vendor had an equitable claim upon them, not revoked by the bankruptcy, although it was strongly pressed by *Parke arguendo*, that the appropriation by the bankrupt was not binding, as it had not been communicated to the purchaser. *Row* v. *Dawson* (*b*) also shews that an order of this kind does give an equitable lien. So in *Yeates* v. *Groves* (*c*), where there was an order to pay *A.* out of purchase-money to be received, it was held that *A.* had a lien on the purchase-money. Then the decision of *Carvalho* v. *Burn* (*d*) in the different Courts, shews one point to have been agreed to on all sides, viz. that an equity would pass to a third party without the assent of the holder of the fund; and in the Court of Chancery the party succeeded on his equitable claim, although, as the action was trover in a Court of Law, it was held that he could not recover; and the ground of decision given by many of the judges was, that there did not distinctly appear to be an equitable claim. But if the defendants have an equitable claim, it is absurd to say that they can be liable in an action for money had and received, which is an equitable action. The assent of the holder of the fund is necessary to give a legal right, but that is given here in fact by the defendants, as partners of the foreign houses. The order itself gives an equitable right, and that is sufficient to prevent the money passing to the assignees, as is proved by *Tibbitts* v. *George* (*e*). It was objected there that no notice had been given to the holder of the fund, but it was said notice to his attorney was sufficient. How

(*a*) 8 B. & C. 448; *S. C.* 2 Mann. & R. 564.

(*b*) 1 Ves. sen. 331.

(*c*) 1 Ves. jun. 280.

(*d*) 4 B. & Ad. 382; *S. C.* (in error), 1 A. & E. 883, and 1 N. & M. 700; in equity, 7 Sim. 109.

(*e*) 5 A. & E. 107; *S. C.* 6 N. & M. 804.

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much stronger a case the present is, where the notice was to a partner of the foreign houses. It cannot be said that the Liverpool house and the foreign houses are distinct, for the case expressly finds partnership. Where that is so, it cannot be necessary to give notice to all the members of a mercantile firm. On the whole, whether this was an equitable assignment or a specific appropriation, the defendants were justified in paying the money to *Royds* & Co.

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Cresswell, in reply. The principle is, if an order is made on the holder of a fund, giving a third party an interest in it, the order amounts to a bill of exchange. If it is delivered to the holder of the fund, it is to be taken as so delivered on behalf of the payee. In *Butts* v. *Swann* (*a*), the letter was a request to pay to "*H.* or their order," but how can the words "their order" distinguish the case. If the letter gave *Royds* & Co. a control over the fund, it was a bill of exchange. It is said not to be a bill of exchange, because it was a matter of agreement contained in the different letters; but the same argument was used in *Firbank* v. *Bell* (*b*), and repudiated by Lord *Ellenborough* C. J., who said that, as respected the bankrupt, there was nothing with which he was connected but the simple order to pay. What action could have lain against the defendants by *Royds* & Co., for not

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paying over the money? In order to make the transfer of a debt binding, according to *Scott* v. *Porcher* (*c*), all the parties must agree, and to the same agreement. This question was much considered in *Wharton* v. *Walker* (*d*), and it was there held that the action could not be sustained against parties in the situation of the defendants, unless the debtor was discharged from his original debt. [*Patteson* J. In that case, if the defendant had paid the money, it would have been a good discharge as against his landlord, but you

(*a*) 2 B. & B. 78.
(*b*) 1 B. & Ald. 36.
(*c*) 3 Mer. 652.
(*d*) 4 B. & C. 163; *S. C.* 6 D. & R. 288.

say there might be a revocation, and your argument goes to shew that no case of an equitable assignment is safe.] It is submitted that if the payment takes place before revocation, that is a discharge; but if the revocation comes first, there is an end to the liability. In *Hodgson* v. *Anderson* (*a*), where the plaintiff was indebted to the Commercial Bank, and with the defendant's consent assigned to the bank a debt due from the defendant to himself, the Court held that the plaintiff was bound by it, and that he could not revoke; but there the defendant had made himself liable to the bank, and was therefore discharged of his debt to the plaintiff. But here there was no debt due from the defendants to *Hunt* & *Jenkinson*, on the contrary, the balance seemed the other way. There was nothing therefore that could be assigned. It is said also that all the houses were the same, but there is nothing in the case to shew that. Suppose one of the foreign houses had sold the bankrupt's goods and retained the proceeds, and *Royds* & Co. had sued them, on what ground could they recover, the foreign house having had no notice? Suppose again the goods had remained in specie, the order to *Royds* & Co. did not affect the goods, and therefore they would have passed to the assignees, on satisfying the Liverpool house the lien they had upon them. It is a burden therefore on the other side to shew that, at the time of the order, the goods were sold, and that money had and received would lie then. It is said that the assignees never revoked the order, but that is a fallacy; for if *A.* orders goods to be consigned to *B.* for one purpose, and then countermands that order, and directs him to receive them on another appropriation, that amounts to a distinct countermand. [*Patteson* J. It would be hardly possible for the assignees to have prevented the goods coming to the defendants, because they would be probably remitted to them under bills of lading, and I should conclude from the earlier part of the case, that the defendants had some lien

(*a*) 8 B. & C. 84; *S. C.* 5 D. & R. 735.

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on the goods, which shews the difficulty of revocation b the assignees. *Coleridge* J. With regard to the debt du from *Hunt* & *Jenkinson*, if the goods had been sold, ther would have been a subsisting debt.] Not if the goods ha been sold by one of the foreign houses, because the house are different, and a commission-house is not responsible fo its foreign correspondents, except under a del credere com mission. In *Best* v. *Argles* (*a*), the Court held there wa no equitable assignment, and that decision explains awa many of the cases cited on the other side. In order t make an equitable assignment, there must be a sale of a actual fund, and a good consideration for it, as in *Tibbitt* v. *George* (*b*). But where a mere authority to pay over certain sum or certain proceeds is irrevocable, there th position of the parties to the transaction must be in som way changed. Either the original debt must be discharged or time must be given, otherwise there is no considerati for the new promise. [*Coleridge* J. How, in *Crowfoot* v *Gurney* (*c*) was *Streather* more discharged than *Hunt* i here?] *Tindal* C. J. seemed to consider that there wa good consideration for the transfer, for he observes "ther was consideration enough for such an assignment; fo *Tolley*, from the time of the order, appears to have ab stained from making any application to *Streather*, and t have looked to *Gurney* alone." Here it has been shew that no debt was due from the defendants at that time.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judg ment of the Court.—There are two questions in this case first, whether the letter of *Hunt* & *Jenkinson* to the defend ants, of the date of September 28, 1831, required the stam imposed by *55 Geo.* 3, c. 184, as an order for the paymen of money; if it did, then it was not admissible in evidence

(*a*) 2 C. & M. 394.
(*b*) 5 A. & E. 107; *S. C.* 6 N. & M. 804.
(*c*) 9 Bing. 372.

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and as that letter was the authority for paying the 5000*l.* to *Royds* & Co., there must be judgment for the plaintiffs: second, supposing that letter did not require a stamp as an order for the payment of money, whether the authority contained in it was revoked by the bankruptcy of *Hunt* and the notice from the assignees; if it was so revoked, in that case also there must be judgment for the plaintiffs. As to the first question, the clause in the schedule of 55 *Geo.* 3, c. 184, applicable to this is:—"All bills, drafts or orders, for the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency, which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same be delivered to the payee or some other person on his behalf." Then, in determining whether it be an order for the payment of money within the meaning of the schedule, the first thing to be considered is, whether, as it is not an order to pay a distinct sum of money, but only the proceeds of funds, provided they do not exceed 5000*l.*, it falls within the act. In *Jones* v. *Simpson* (*a*) where the order was to sell certain goods, which were stated to be of about the value of 2000*l.*, and to pay the proceeds, the Court was quite clear that it did not fall within the description in the schedule as to the liability to stamp duty, because there was no sum mentioned on which the duty could attach; and if the question in this case had arisen upon the letter of 23d September, in which there is no precise sum mentioned, that letter, according to the case of *Jones* v. *Simpson* (*a*), just mentioned, would not have required any stamp; but in the letter of the 28th September, 1831, there is a sum of 5000*l.*, which may be paid; and though it might not necessarily be so much, yet, as in the schedule as to inland bills, a duty is imposed "where the total amount thereby made payable shall be specified therein, or can be ascertained therefrom," we think that the case arising out of the letter of the 28th September differs from *Jones* v. *Simp-*

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(*a*) 2 B. & C. 318; *S. C.* 3 D. & R. 545.

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son (*a*), and that if on other accounts it be an order for the payment of money within the meaning of the schedule, a stamp duty in respect of 5000*l.* would attach upon it. But the schedule as to orders for payment of money requires, that in order to make a stamp necessary they should be made payable to the bearer, or to order, or be delivered to the payee or some person on his behalf. In the cases of *Emly* v. *Collins* (*b*), *Firbank* v. *Bell* (*c*), *Butts* v. *Swann* (*d*), no question was made as to these qualifications, nor was it necessary; for in *Emly* v. *Collins* (*b*) the order was delivered to an agent of the payee; in *Firbank* v. *Bell* (*c*) the order appears to have been delivered to the payee, inasmuch as the payee is stated to have sent a copy to the person to whom the order was addressed; and in *Butts* v. *Swann* (*d*) the order was made payable to order. But the present letter does not make the money payable to the bearer or to order, and is not delivered to the payee. Then is this document delivered to any person on behalf of the payee within the meaning of the schedule? Now the letter containing the authority to pay is delivered to the defendants; and then is that a delivery to them on behalf of the payees, Messrs. *Royds* & Co.? So far it is a delivery to the defendants for the benefit of the payees, and the defendants may be trustees for them: but it was not meant that the defendants should hand over the document to the payees; they were to act upon it as they might think right, and according to what was expected they should do; but when they did not act upon it by any promise or undertaking, that did not constitute a delivery of the document itself to the payees, but the defendants were to keep the document themselves, not as agents to the payees, but for their own security, to prove, when they should pay the money, that it was by authority of the persons who gave the order that they had done so. The giving the undertaking by the defendants to Messrs. *Royds* & Co. could not be coupled with the letter of *Hunt* & *Jen-*

(*a*) 2 B. & C. 318; *S. C.* 3 D. & R. 545.

(*b*) 6 M. & S. 144.

(*c*) 1 B. & Ald. 36.

(*d*) 2 Brod. & Bing. 78.

kinson to the defendants, so as to make a stamp necessary, because the question of a stamp must be decided by the instrument when it is first issued, and not by what may happen afterwards. And we think that the delivery to the payee, or some person on his behalf, means a delivery either personally to the payee, or to some agent or representative of his, and does not mean the person to whom the order is addressed; and consequently this document, which is addressed and sent to the defendants, is not such an instrument as under the part of the schedule in question requires a stamp. Then, having come to the conclusion that this document did not require the stamp contended for, the remaining question is, whether the authority to pay to the extent of 5000*l.* was countermanded by the bankruptcy of *Hunt* & *Jenkinson*, and the notice from the assignees? If the case had stood merely upon the authority in the letter of the 28th September, without more, and the defendants and *Hunt* & *Jenkinson*, or Messrs. *Royds* & Co., had not done any thing more, and the money had been paid upon it, we think the authority to pay would have been revoked by the bankruptcy and the notice from the assignees: but that is not the state of things as they exist, and the whole of the circumstances must be considered. The first document is the letter of 23rd September, 1831, by *Hunt* & *Jenkinson*, to the defendants, authorizing them to pay money to Messrs. *Royds*. Upon the receipt of this, the defendants write to *Hunt* & *Jenkinson* a letter, which they either had sent or proposed to send to Messrs. *Royds*, but *Hunt* & *Jenkinson* think it is not satisfactory, and they return it to the defendants, and revoke the authority contained in the letter of the 23d of September, and send the letter in question of the 28th September, which they wish to be acted upon; and the defendants, upon receipt of that, write to Messrs. *Royds*, giving an undertaking to comply with the letter of *Hunt* and *Jenkinson* on being guaranteed by Messrs. *Royds;* and then in answer Messrs. *Royds* & Co. give the defendants the guarantee which they asked for. It appears, therefore, that all

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the three parties, i. e. *Hunt* & *Jenkinson* as one of the parties, the defendants as another, and *Royds* & Co. a third, all concurred in the arrangement; and that *Hunt* & *Jenkinson* were aware that the defendants meant to require the guarantee of Messrs. *Royds*, inasmuch as the defendants' letter to Messrs. *Royds* of the 23d of September, requiring the guarantee, was contained in the letter of that date from the defendants to *Hunt* & *Jenkinson*. It appears, therefore, on the whole, that *Hunt* & *Jenkinson* being indebted to their bankers, Messrs. *Royds* and Co., and in the common course of things expecting further advances or else a forbearance of pressure for the payment of what was due, authorize the defendants to pay money out of certain funds to the extent of 5000*l.* to Messrs. *Royds* in liquidation of the whole or part of their debt, the defendants give to Messrs. *Royds* an undertaking to do so, but conditionally that a guarantee of indemnity shall be given by them, which guarantee Messrs. *Royds* do give, and accept the undertaking of defendants. The whole of this taken together appears to us to constitute an appropriation of funds to the extent of 5000*l.* to Messrs. *Royds*, or else to an equitable assignment of these funds; but whether it be an appropriation of funds or an equitable assignment, it is not in either case, in our opinion, revoked by the bankruptcy of *Hunt*. But it is contended, by the plaintiffs, that an arrangement of this sort ought to form part of the original transaction. But there does not appear any original transaction to which this can be referred, the dealing between *Hunt* & *Jenkinson* and the defendants began twelve years before 1831, when it began between Messrs. *Royds* and *Hunt* & *Jenkinson* does not appear; but the dealing of *Hunt* & *Jenkinson* with these respective houses had been quite distinct, and had nothing to do with each other; the transaction in question was the first in which all the parties were originally concerned. It is said there is no consideration for this arrangement, but we think there is, for *Hunt* & *Jenkinson* were indebted to Messrs. *Royds* in upwards of 5000*l.*, and

the latter, on receiving this contingent security for 5000*l.*, of the probability of realizing which they would no doubt inquire, would be more inclined to give additional credit to *Hunt* & *Jenkinson*, and the latter would be less likely to be proceeded against for the recovery of the money by Messrs. *Royds* & *Co.* Then it is said, that the defendants did not pay this money on the authority of *Hunt* & *Jenkinson*, but on the guarantee of Messrs. *Royds*; but though they would not have paid it without the guarantee of Messrs. *Royds*, they paid it principally on the authority of Messrs. *Hunt* & *Jenkinson*, and, in fact, they paid it on both together. It is said also, that as to some of the cases there was a specific ascertained debt, to which the appropriation or assignment of the funds was to be applied. But we think it not necessary that the debt to which the appropriation was to be made should be ascertained. The funds to be appropriated were not to exceed 5000*l.*, and if the debt due to *Royds* was less, the money to be paid to them would be less; but it can make no difference whether the debt due to *Royds* was a specific sum of 1000*l.* or any indefinite sum, but so that whatever their debt was, they should get no more than 5000*l.* A great many cases have been cited on the argument, and we may refer to *Row* v. *Dawson* (*a*), *Yeates* v. *Groves* (*b*), *Fisher* v. *Miller* (*c*), *Hodgson* v. *Anderson* (*d*), *Wharton* v. *Walker* (*e*), *Fairlie* v. *Denton* (*f*), *Bailey* v. *Culverwell* (*g*), *Hunt* v. *Mortimer* (*h*), *Crowfoot* v. *Gurney* (*i*), *Tibbitts* v. *George* (*k*), *Smith* v. *Smith* (*l*), *Williams* v. *Everett* (*m*), *Carvalho* v. *Burn* (*n*), *Scott* v. *Porcher* (*o*). Not indeed that any of these cases are precisely

(*a*) 1 Vesey, 331.
(*b*) 1 Vesey, jun. 280.
(*c*) 1 Bing. 150.
(*d*) 3 B. & C. 842; *S. C.* 5 D. & R. 735.
(*e*) 4 B. & C. 163; *S. C.* 6 D. & R. 288.
(*f*) 8 B. & C. 395; *S. C.* 2 Mann. & R. 353.
(*g*) 8 B. & C. 448; *S. C.* 2 Mann. & R. 564.
(*h*) 10 B. & C. 44; *S. C.* 5 Mann. & R. 12.
(*i*) 9 Bing. 372.
(*k*) 5 A. & E. 107; *S. C.* 6 N. & M. 804.
(*l*) 2 Cro. & Mees. 231.
(*m*) 14 East, 582.
(*n*) 4 B. & Ad. 382.
(*o*) 3 Mer. 652; 1 A. & E. 883; *S. C.* 1 N. & M. 700.

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the same as the present; but the principles on which they were decided we think apply to the view we have taken of this case. In *Carvalho* v. *Burn*, first in this Court, 4 B. & Ad. 382, and afterwards in the Exchequer Chamber (*a*), the assignees of the bankrupt were held entitled to recover under circumstances bearing some resemblance to this; but that was an action of trover for goods, and the two Courts of Law held that the assignees had the legal property in the goods, leaving the equitable rights of the parties to be considered in a Court of Equity; and in the same case (*b*) the Vice-Chancellor, on demurrer to a bill in equity, seems to have considered that the defendant at law, who stood in the same situation as the defendants here, was entitled to the benefit of the arrangement against the assignees of the bankrupt; and that decision of the Vice-Chancellor's was afterwards confirmed by the Lords Commissioners. In the case of *Scott* v. *Porcher* (*c*), Sir *Wm. Grant*, Master of the Rolls, says, "the case is stripped of almost every circumstance that has ever been relied upon as constituting an irrevocable appropriation;" and amongst other things there had been no communication made by *Porcher* (who stood in the same relative situation as *Royds*) of the directions that had been given; but here every thing has been done that could be, and it seems, from the whole remarks made by the Master of the Rolls, that under circumstances like the present he would have been of opinion with the defendants. Upon the whole of this case then, we are of opinion that a nonsuit should be entered.

Nonsuit to be entered.

(*a*) 1 A. & E. 883.
(*b*) 7 Sim. 109.
(*c*) 3 Mer. 652.

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Friday, Nov. 30th.

DANGERFIELD *v.* THOMAS.

DEBT on bond for 1250*l.*, bearing date the 25th August, 1835. Plea; that on the 20th January, 1836, a fiat of bankruptcy issued against the plaintiff, and that by reason of the premises his assignees had become entitled to the debt in the declaration mentioned.

Replication; that before the bankruptcy of the plaintiff and fiat, by indenture of the 1st September, 1835,—made between the plaintiff and *J. A. Gardiner* and *M. Elgie*, surviving executors of *John Allcott*, and reciting that the plaintiff was indebted to them in 1580*l.* upon a cognovit, and 80*l.* for costs; and that by a certain bond, namely, the bond declared upon, the defendant had become bound to the plaintiff in 1250*l.*, conditioned for the payment of 625*l.*,—the plaintiff assigned to them the said bond and all his interest therein, as a further security for the 1660*l.* due to them, subject to a proviso for redemption on payment of the 1660*l.* on the 1st March then next ensuing; that they were appointed the plaintiff's attornies to sue on the bond; that the defendant, before the plaintiff became a bankrupt, and before the issuing of the fiat, had notice of the assignment; that plaintiff did not, on the said 1st March, pay to *J. G.* and *M. E.* the 1660*l.*; and that at the commencement of the present action there was owing to them 800*l.*—a sum exceeding the amount due upon the bond; and that the action was prosecuted in the plaintiff's name at their instance, and for their sole benefit.

Special demurrer, on the ground, 1, that plaintiff had not such bond; and that the action was brought for their benefit:—Held, on special demurrer, 1. That the plaintiff was not bound to make profert of the indenture. 2. That the replication was right in setting out facts to shew in what way the bond was prevented from vesting in the bankrupt's assignees, and that it was not bad for argumentativeness in not traversing that the bond did vest in them. 3. That although the bond was stated to have been given only as a further security, and there was a proviso for its redemption on payment of the debt, the bankrupt had no possibility of interest to pass to his assignees, as the balance of the unpaid debt exceeded the amount of the bond, and it did not appear that any other valuable security had been given.

To debt on bond the defendant pleaded that a fiat of bankruptcy had issued against the plaintiff, under which certain persons had been appointed his assignees, and that by reason of the premises they had become entitled to sue upon the bond. Replication, that by an indenture, reciting the plaintiff to be indebted to certain persons upon a cognovit, in more than the amount of the bond, the plaintiff had assigned the bond to them as a further security, with a proviso for redemption; and that the balance of the debt remaining unpaid was larger than the amount of

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brought the indenture mentioned in the replication into Court, or made any profert thereof, or alleged any excuse for not having done so. 2. Also, that plaintiff had not confessed and avoided, or traversed, any of the matters of fact set forth in the plea, and that, for any thing appearing in the replication, the plaintiff left it uncertain whether he intended to admit or deny that the debt mentioned in the declaration passed to the assignees appointed, as in the plea mentioned. 3. Also that the plaintiff, by the replication, attempted to put in issue, to be tried by the country, mere inference and matter of law, namely, whether the debt in the declaration mentioned, by means of the bankruptcy of the plaintiff and the appointment of assignees in the plea mentioned, became legally vested in such assignees, the same replication admitting all the facts stated in the plea. 4. Also that the replication was argumentative, and no certain issue could be taken thereon, and was in other respects insufficient, &c. &c.

The following statement was given of the points intended to be argued:—

For the plaintiff:—1. That the replication was good, because it was shewn therein that the plaintiff assigned the bond debt sought to be recovered, for a valuable consideration, before his bankruptcy; and that the amount of the debt, as a security for which the bond was assigned by him as therein mentioned, greatly exceeded the amount due upon the bond; and that it was shewn that the assignees of the plaintiff under the fiat could take no beneficial interest in the debt sued for, and that therefore the action was correctly brought in the name of the plaintiff for the benefit of the assignee of the bond. 2. That profert of the indenture was unnecessary, inasmuch as it appeared that he was not the party entitled to the indenture or to the possession thereof, or that the same was left in his possession or power; and because the statement of the indenture was merely matter of inducement and collateral to the cause of action.

For the defendant:—That the debt secured by the bond

declared on was not assignable; and that, notwithstanding the deed of assignment, it remained vested in the plaintiff at his bankruptcy, and was afterwards transferred to his assignees under the fiat. The defendant relied also on the special causes of demurrer assigned.

Swann, in support of the demurrer. The plaintiff, by the replication, identifies himself in interest with the assignees under the indenture, and if it were not for the indenture, he could not maintain this action; he should therefore have made profert of the indenture: *Com. Dig.* tit. Pleader (O 1). Secondly, the replication is argumentative: it should have traversed the allegation in the plea, that the debt passed to the assignees under the bankruptcy. Lastly, it is not shewn that the plaintiff's bankruptcy is not an answer to this action. In *Winch* v. *Keely* (*a*), which may be cited for the plaintiff, it was decided that the assignor of a debt, who has become a bankrupt, may sue the debtor for the benefit of the assignee; but that was on general demurrer. If the plaintiff's bankruptcy be not an answer to this action, it must be because he has assigned all possibility of beneficial interest in the debt; for in *Carvalho* v. *Burn* (*b*) it is laid down by *Littledale* J., in delivering the judgment of the Court that, if at the time of the bankruptcy the bankrupt possess a possibility of interest, from which a benefit to his creditors may result, the whole of the subject-matter in which he has such interest would pass to his assignees. This doctrine was recognized by *Tindal* C.J. in *Leslie* v. *Guthrie* (*c*). Here there was a proviso for redemption of the bond, and the assignment of the bond was only for further security, so that the assignees of the bankrupt would take the legal estate. There was clearly a possibility of interest to the creditors, so that the assignees under the bankruptcy would have a right to have an account taken

(*a*) 1 T. R. 619.

(*b*) 4 B. & Ad. 382; affirmed in error, 1 A. & E. 883; *S. C.* 1 N. & M. 700.

(*c*) 1 Bing. N. C. 697.

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in equity, to know what the other securities for the debt due to *Gardiner* and *Elgie* had produced, and, even if the unpaid amount of debt exceeded the value of the bond, they would be entitled to have the bond back on payment of such amount.

R. V. Richards, contrà. It was not necessary for the plaintiff to make profert: he has no interest in the indenture, and has no right to its possession. Many cases, similar to the present, where profert is dispensed with, are collected in 1 *Wms. Saund.* 9 a, n. 1. Besides, the indenture passed an equitable interest only: it was the assignment of a mere chose in action; and profert of such a deed in a court of law cannot be more requisite than of a deed operating under the Statute of Uses. [Lord *Denman* C.J. We think that is an answer.] Secondly, If the replication, instead of setting out the special facts, had denied that the bankrupt's assignees were possessed, it would have been a mere traverse of a virtute cujus. [Lord *Denman* C. J. We think it good on that point.] Thirdly, *Winch* v. *Keeley* (*a*) and *Dean* v. *James* (*b*) are neither of them distinguishable in principle from the present case. The bankrupt's assignees could have no interest in the bond; the amount of which is expressly alleged to be less than the unpaid balance of the debt for which it was assigned.

Swann, in reply. Profert of a deed is necessary, though it may be merely collateral, and though no interest is claimed under it: *Com. Dig.* tit. Pleader (O 7).

Lord DENMAN C. J.—The plaintiff is entitled to judgment. The objection to the replication, that it does not traverse the averment in the plea of the bond debt vesting in the bankrupt's assignees, is untenable. The replication in that form would have left all the defendant's facts uncontradicted, and would not have shewn in what way the debt was prevented from vesting in them; whereas, in the pre-

(*a*) 1 T. R. 619. (*b*) 1 A. & E. 809, n; *S. C.* 1 N. & M. 392.

sent form, it clearly appears that the debt did not so vest, because they could have no beneficial interest in it. There was no necessity for the plaintiff to make profert of the indenture, by which the debt was assigned; for the assignees under the indenture are the parties who have the interest in that instrument adversely to the plaintiff. With regard to the general question, the assignment effected a complete transfer of the plaintiff's interest in the debt; and although it is stated to have been made for a "further security," yet it does not appear that there was any other valuable security, such as a mortgage of land. It might, on that supposition, have been necessary to shew that the former security had failed; but the actual case on the record discloses a mere personal and money transaction, and nothing more.

PATTESON J.—I am of the same opinion. The plea, after averment of the plaintiff's bankruptcy and of the appointment of assignees, adds, that they, "by reason of the premises," became entitled to the bond debt in question: so that if the replication had been framed, as it is contended for the defendant it ought to have been, it would have traversed the virtute cujus—a mere inference of law, and would have admitted all the facts constituting those premises. As now framed, however, it alleges other facts, which shew in what manner the bankrupt's original interest in the bond was prevented from passing to his assignees. The objection, that there should have been profert of the indenture, would have been well founded, if there could be in law an assignment of a chose in action, the assignees of which were the parties suing on it. But here the assignor is the plaintiff, and the indenture is not the foundation of the action, but is mentioned by way of inducement only, to shew that, notwithstanding his bankruptcy, he is entitled to sue. It is said that profert should have been made, because the plaintiff sues for the benefit of those to whom the bond was assigned, and that he is

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identified with them: but they are not the plaintiffs on the record, and they, and not he, must be taken to have custody of the indenture. With respect to the general question, it appears that the bond was assigned to secure a debt much larger than the amount of the bond, and that the balance of the debt remaining unpaid is also larger than such amount so that there could be no possibility of benefit to arise from the bond to the bankrupt's estate, unless other valuable securities had been given for the same debt. But the only other security disclosed is a judgment, which is a mere personal matter, and the transaction itself appears to have been wholly a money transaction.

WILLIAMS J.—I cannot understand why the plaintiff should be called upon to make profert of the indenture. The assignment effected by it was no part of his title at law to maintain this action, which is brought upon the original bond. It has been said that his interest in the bond was not completely transferred, but that a residue still remained in him for the benefit of his estate. I cannot conceive what interest could remain, as the bond was of much smaller amount than the debt for which it was assigned.

COLERIDGE J.—It has not been denied that the general rule is not to require profert except when an instrument ought properly to be in possession of the party pleading it; but it is contended that the present case is not within the rule, because the plaintiff is identified in interest with the parties entitled to possession of the indenture, as he is suing for their benefit. Now, so far from that being the case, their interest in the indenture is adverse to his: he takes nothing by it, and he is the plaintiff upon the record.

Judgment for the plaintiff.

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Thursday, June 14th, and *Saturday, December 1st.*

The QUEEN *v.* WILLIAM HALE, D.D., Prebendary of St. Paul's.

TALFOURD Serjt., in Trinity term last, had obtained a rule, calling upon the defendant to shew cause why a mandamus should not issue, to grant to the master, wardens and commonalty of freemen of the Clothworkers' Company, or their trustees, a licence to dig five acres of brick earth in the copyhold premises of the manor of Islington, on payment of the accustomed sum of 21*l.* for every such acre; and also another rule for a mandamus to the defendant, to grant a licence to the same Company, or their trustees, to demise, for a term of forty years, one piece of ground, parcel of the said manor; and also to demise, for a term of twenty-one years, another piece of ground, parcel of the same manor.

By the affidavits on which the rule was obtained, it appeared that the Clothworkers' Company were seised of certain copyhold tenements of the prebendal manor of Islington, of which a prebendary of St. Paul's, London, is, for the time being, the lord; and it was stated, "that by the custom of the manor, the fine to the lord, on the admission of a copyhold tenant, is 6*s.* 8*d.* for every acre, and the like sum for every messuage or tenement on the premises, to which such tenant is so admitted;" and it appears by the documents in the possession of the said Company, that by the custom of the said manor the tenants have a right to demise for any period not longer than three years, without requiring any licence for so doing; and that for every licence to demise for any longer term, the lord is entitled by such custom to 4*d.* for every year of a term mentioned in such licence; and that from time immemorial the lords of the manor have been accustomed to grant such licences for different periods,

1. The Court discharged a rule for a mandamus to the lord of the manor to compel him to grant a licence for a tenant to dig brick earth, for the purpose of making bricks, there being no evidence of any custom to grant such licences, except that they had frequently been granted since 1729, on payment of 21*l.* for each acre.

2. By the custom of a manor the tenants had a right to demise for any period not longer than three years without a licence, and for every licence to demise for a longer period the lord was entitled to 4*d.* for every year of the term granted. Several licences were shewn, the earliest in 1729, under which various terms of years, but not exceeding forty-seven, had been granted. Under these circumstances the Court discharged a rule for a mandamus to the lord to grant a licence to demise for two several terms of forty and twenty-one years.

3. *Quære*, whether under any circumstances the Court will issue a mandamus to the lord of a manor to grant a licence to a tenant to demise.

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without any restriction, limiting the term to the life or incumbency of the prebendary granting such licences, until the appointment of the present prebendary. By the court rolls of the manor it appeared, that from the first entry made therein, under the date January 20, 1729, down to the present time, the lords of the said manor have been accustomed to grant licences to the tenants, authorizing them to demise the premises held by them of the said manor, for terms of 21 years, 22 years, 31 years, 41 years, 47 years, and various other terms. The affidavits then set out an application to the defendants for a licence to demise on a building lease for forty years. The defendant refused, under legal advice, to grant a licence beyond the period of his own life or incumbency, except on condition that it be understood, that by such licence he did not warrant the licence should be in force after his death or incumbency. The affidavits also stated, that by the court rolls of the manor, from the first entry in 1729 downwards, it appeared "that the lords of the said manor for the time being have been accustomed to grant licences to the tenants, authorizing them to dig brick earth and convert the same into bricks, receiving for such licences 21*l.* for each acre comprised in such licence."

Sir *J. Campbell* A. G. shewed cause, in Trinity term last (*a*). There is no pretence for this application. All that would appear from the affidavits is, that during the last century a licence has been given occasionally to dig for brick earth, but it cannot be contended, that because the lord of the manor has occasionally given a licence to commit waste, a custom can have grown up for the tenant to compel the lord to grant the licence at any time. It is clear that there can be no custom for such a purpose, as a custom would be bad that tended so directly to the destruction of the tenement. If it were a custom, it would be uniform; but how

(*a*) June 14, before Lord *Denman* C. J., *Littledale*, *Patteson* and *Williams* Js.

can it be contended that it could be a custom, from the time of legal memory, to pay so high a sum as 21*l.* per acre, which at the commencement of the custom would so much exceed the value of the land. The very term "licence" implies that a mere permission by the lord was all that was ever given. With regard to the other rule, there is no precedent of a mandamus compelling the lord to license to let. There appears to be a custom in this case as to the payment of 4*d.* on a licence to let, but there is no custom as to the term itself, for which the lease is to be granted. In *Porphyry* v. *Legingham* (*a*) it is said, that in *Grove* v. *Bridges* a custom that on payment of ten years' rent the lord should license to let for 99 years, and, if he refused, that the tenant might do it without licence, was adjudged good. That case is not very satisfactory, and, at all events, such customs must be proved by the most satisfactory evidence; 1 *Scriv.* on Copyholds, 545 (3d ed.), and the authorities there cited. The lord cannot be compellable to grant a licence to demise, on payment of 4*d.*, otherwise the tenant might, on such payment, in effect, demise without any licence at all; and unless such a licence would be valid as against his successor, so as to give the tenant an indefeasible interest, of what use would it be? This is a prebendal manor, and the lord cannot grant an interest to extend beyond his own life.

Talfourd Serjt. and Sir *W. W. Follett*, contrà. The term "licence" is a legal description of the lord's permission to the tenant, of certain customs within the manor. Thus in many manors the tenant cannot demise without the lord's licence, and in *Ballard* v. *Agard* (*b*), 6 *Vin. Abr.* Copyhold, (Y e), a court of equity interposed to compel the lord to grant his licence for that purpose. So in *Grove* v. *Bridges*, cited 1 *Scriv.* on Copyholds, 545, it was held that a custom that on payment of ten years' rent the lord should license to let for 99 years, and that, if he refused, the tenant might do it without licence, was adjudged good. At all events the writ

(*a*) 2 Keb. 344. (*b*) Toth. 45.

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ought to go, to see if any answer can be made to the three instances that have been alleged. It is strong evidence of a custom that the sum paid for digging brick earth has been invariable for the last 100 years, although land has much increased in value during that period. As to the custom to demise, it is confined to a licence to demise for forty-seven years at the most. There can be no custom as to the payment, unless there be also a custom as to the licence, as the lord might always extort an extra payment by a refusal to license. If the lord said he was willing to license on payment of 6*d.* instead of 4*d.*, this Court would interfere. It is said that this is a prebendal manor, and that the lord cannot therefore grant a licence for a longer period than his own life. But it does not appear how long this has been a prebendal manor, and if the custom existed previously, it of course would not be destroyed on the manor passing into ecclesiastical hands. If there were a customary fine of 4*d.* on admission of a tenant, and the lord claimed 6*d.*, this Court would certainly compel him to admit on the payment of 4*d.* If mandamus is not grantable in this case, the tenants are without remedy.

Cur. adv. vult.

On the following day, Lord DENMAN C. J. gave judgment.—The rule argued yesterday, which raised the question whether the lord was compellable to license an act amounting to waste, must be discharged. It is not shewn that there was any customary fine payable for such a licence; for the sum of 21*l.* per acre must have been introduced since the time of legal memory. As to the other rule, we will take time to consider our judgment.

Cur. adv. vult.

Lord DENMAN C. J., on this day (Dec. 1) delivered the judgment of the Court.—This was an application for a writ of mandamus to the lord of a manor to grant to a tenant a licence to demise his copyhold for a term of years. The only ground for the application is an alleged custom in the manor, that the lord should receive 4*d.* per annum for such

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a licence. Independent of such a custom, it is plain that the granting or refusing a licence is a matter wholly in the lord's discretion, and the question is, what is the operation of such a custom. On the one hand it is said, that if the lord can, notwithstanding the custom, refuse to license altogether, he may indirectly extort a larger sum for a licence than the custom warrants, and that therefore his discretion must be taken away. On the other hand it is urged, that if the custom compels the lord to license, it in effect amounts to a custom to demise without licence, paying 4*d.* per annum, which custom is not directly assumed nor pretended to exist; but if it do exist, the tenant may demise on tendering the 4*d.* per annum, without danger of forfeiture, and does not want the assistance of this Court. No instance is to be found of this Court granting a mandamus to the lord to license under any circumstances. It is said to have been decided that he may be compelled to do so in equity, but the authority cited is by no means clear or satisfactory. Under these circumstances, we are of opinion that the rule for a mandamus must be discharged.

Rule discharged.

PITCHER *v.* KING.

Friday, Nov. 30*th.*

1. Case against a sheriff. The first count of the declaration stated that the plaintiff, at the county court of the defendant, as sheriff, recovered judgment against *B.*; that the plaintiff thereupon sued out a fieri facias of the defendant, directed by defendant to his bailiffs, commanding them to levy &c.; that though there were divers goods &c., yet that the defendant intending &c., did not nor would levy, and that the defendant's bailiff, by the direction of the defendant, falsely returned &c.:—Held to disclose no cause of action against the sheriff.

2. To a second count, for a false return to a fieri facias, on a judgment of the King's Bench against *B.*, the defendant pleaded that, after the suing out the said writ, and after the said return, the plaintiff sued *B.* in the King's Bench on the said judgment, and recovered judgment thereon, which still remained in force, by means of which premises the said judgment in the said count mentioned became merged and satisfied, the fieri facias abandoned, and the defendant discharged:—Held, on special demurrer, that the plea was no answer.

CASE against the sheriff of the county of Sussex. The first count of the declaration stated, that the plaintiff, at the

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county court of the defendant as sheriff, recovered judgment in a plea of debt against one *Bean;* that thereupon the plaintiff sued out a writ of the defendant, then being sheriff, called a fieri facias, directed by defendant to his bailiffs; by which writ defendant commanded them to levy the debt, &c.; that although there were divers goods of *Bean* within the defendant's bailiwick, whereof the debt might have been levied, whereof the defendant had notice, yet that he, intending &c., did not nor would levy, and that the defendant's bailiff, with the privity and by the direction of the defendant, as such sheriff, falsely and deceitfully returned to the defendant that the said *Bean* had no goods in the defendant's bailiwick whereof the debt could be levied &c. The second count, for a false return to a writ of fieri facias, on a judgment of debt against *Bean* in the Court of King's Bench, alleged that the defendant had seized the goods of *Bean* in execution, had received out of them a large sum of money, to wit &c., on account of the monies directed to be levied, and had falsely returned that they remained with him for want of buyers. The third count, after stating the recovery by the plaintiff of another judgment of debt against *Bean* in the King's Bench, and the issuing the writ of fieri facias to the defendant, alleged that there then were divers goods of *Bean* within the defendant's bailiwick, on which goods he might have levied the monies indorsed upon the writ, of which he had notice; yet that the defendant had not the said monies at the return of the writ, and did not levy the same, but falsely returned that he had seized the said goods, and that they remained with him unsold for want of buyers, and that therefore he could not have the monies in said writ mentioned, &c.

The only plea, which became material, was to the second and third counts. After averring the identity of the judgments, writs and returns, in those counts respectively mentioned, it stated that after the recovery of the said judgment, and after the suing out of the said writ of fieri facias, and after the said return, the plaintiff impleaded said *Bean* in

the Court of King's Bench, on the judgment in the said counts mentioned, and recovered judgment thereon, which still remains in force; by means of which said premises the judgment in the said counts mentioned, before the commencement of this suit, became and is merged in the judgment so recovered as last aforesaid, and became and is satisfied in law; and also by means of the premises the plaintiff, before the commencement of this suit, waived and abandoned said writ of fieri facias in said counts mentioned, and all benefit and advantage therefrom, and released and discharged the now defendant from the said several premises in the said counts mentioned.

Special demurrer, on the ground that the causes of action in the said counts mentioned, are distinct from the judgment therein mentioned, and not affected by the supposed merger of that judgment, or by the recovery of the judgment alleged to have been recovered; that the matters contained in the plea did not release the defendant from the premises in the said counts mentioned, inasmuch as it appears by the plea that the plaintiff impleaded *Bean* after, and not before, the return in the said counts mentioned, and after the causes of action in those counts were complete and fully vested in the plaintiff, and inasmuch as the now defendant was not a party but a stranger to the several judgments in the plea mentioned; that the plea confessed, but did not avoid the said causes of action; and that it improperly alleged the judgments in the said counts mentioned to be one and the same.

Channell, in support of the demurrer. It is understood that the first count of the declaration will be objected to, on the ground that the sheriff, in directing the writ of fieri facias to his bailiff, acted judicially, as a constituent part of the county court, and that he cannot therefore be made liable for the act of his bailiff; and *Holroyd* v. *Breare* (*a*), and *Tunno* v. *Morris* (*b*), will be relied on. [*Coleridge* J. And

(*a*) 2 B. & Ald. 473. (*b*) 2 C. M. & R. 298.

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Tinsley v. *Nassau* (*a*) also.] But the present is a very different case; it is not brought for taking the plaintiff's goods under an execution against another person, but for a false return made by his bailiff, with his privity, and by his direction, as appears from the record. For the purpose of making the return, he was a ministerial as well as a judicial officer. [Lord *Denman* C. J. We are of opinion that the first count is bad.] The plea to the second and third counts is bad. The plaintiff's right of action, which accrued upon the false return, cannot be defeated by any thing which has taken place between him and a third party; *Wordall* v. *Smith* (*b*). In that case, after a false return of nulla bona to a writ against the plaintiff's debtor, the plaintiff charged him in execution, which might be treated as a satisfaction of the debt. Here, it is not pretended that there has been any execution on the subsequent judgment. And even where the act of a third party may substantially satisfy the plaintiff for the injury complained of, it does not lie in the mouth of the defendant to set up such act as a defence. Thus in *Yates* v. *Whyte* (*c*), which was an action for running down the plaintiff's vessel, it was held that the defendants could not deduct from the amount of damages to be paid by them, a sum which already had been paid by underwriters to the plaintiff, in respect of the injury complained of. *Godsall* v. *Boldero* (*d*), in which it was held that, Mr. *Pitt*'s debts having been paid by the nation, a creditor of Mr. *Pitt*'s, who had insured Mr. *Pitt*'s life, could not recover the amount of the insurance, was decided on account of the peculiar nature of the contract of insurance, which is one of indemnity to the creditor. Even between parties themselves a right of action is not divested, unless by some act amounting to a satisfaction or release; *Willoughby* v. *Backhouse* (*e*), and *Sells* v. *Hoare* (*f*).

(*a*) M. & Malk. 52.
(*b*) 1 Campb. 332.
(*c*) 4 Bing. N. C. 272.
(*d*) 9 East, 71.
(*e*) 2 B. & C. 821; *S. C.* 4 D. & R. 539.
(*f*) 1 Bing. 401.

Platt, contrà. The plaintiff has no right to put in force two remedies for the same matter. The debt due from *Bean* had merged in the first judgment, which might have been pleaded in bar to the second action, and the first judgment merged in the second. Debt will not lie on a judgment, where a plaintiff adopts another remedy, as an execution by elegit; *Com. Dig.* tit. Dett, (A 2). The case of *Wordall* v. *Smith* (*a*) does not appear to have been much discussed, and is inconsistent with other authorities.

Channell, in reply. [*Patteson* J. What is the falsehood alleged in the third count?] It states that there were goods of which the defendant might have levied the monies, and that he falsely returned that the goods remained in his hands unsold for want of buyers. The allegation that the defendant might have levied the monies, shews that the goods did not remain unsold for want of buyers. At all events, there is a complete grievance set out in the count before coming to the return, for it is stated that the defendant might have levied the monies, and that he would not: the rest may be rejected as surplusage.

Lord DENMAN C. J.—We are of opinion that the plea is no answer to the action. The defendant is entitled to the judgment on the first count, and judgment may be taken for the plaintiff on the second and third counts, or on the second only, at his option.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Judgment accordingly.

(*a*) 1 Campb. 332.

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Saturday, December 1st.

PEARSON, Assignee of JAMES GRAHAM, *v.* ROGERS, PENN, and ANDREW GRAHAM.

To a declaration in trover by the assignee of a bankrupt, alleging a joint conversion by three defendants, two of them pleaded that, after the bankruptcy, and more than two months before the issuing of the fiat, under which the plaintiff had been appointed assignee, and before the committing of the grievance, &c., the plaintiff as assignee (to wit, by reason of the relation of his title as such assignee to the time of the bankruptcy,) was the owner of, and entitled to the goods in the declaration mentioned, as of his property as such assignee; and the bankrupt was then (subject only to such title of plaintiff as aforesaid) possessed of and entitled to the said goods, and thereupon, after his bankruptcy, and more than two months before the fiat, one of the defendants bonâ fide bought at a fair price from him the said goods; that the two defendants had no notice of the act of bankruptcy; whereupon the defendant who had so purchased the goods became possessed of them as of his own property, and that while he was so possessed, and at the said time when &c., in the declaration mentioned, he, in his own right, and the other defendant, by his command, converted the said goods, which is the grievance in the declaration mentioned; without this, that at the time of the said conversion the goods were the property of the plaintiff as assignee, or of right belonged to him as assignee. Conclusion to the country:—Held, on special demurrer, that the inducement in the plea amounted to a confession and avoidance, and that the subsequent traverse, therefore, made the plea bad.

Quære, Whether the plaintiff could have treated the special traverse as immaterial, and pleaded over to the inducement?

TROVER by the plaintiff as assignee of *James Graham*, a bankrupt, alleging a joint conversion by the defendants of certain goods belonging to the plaintiff as such assignee. The defendant, *A. Graham*, had pleaded separately from the other two defendants, and judgment had been recovered against him (*a*).

Plea, by the other two defendants: that after the said *James Graham* became a bankrupt, as in the declaration mentioned, and more than two calendar months before the date and issuing of the fiat of bankruptcy against the said *J. Graham*, under which fiat the plaintiff hath been appointed and is such assignee, as in the declaration mentioned, and before the committing of the grievance in the declaration mentioned, to wit, on &c., the plaintiff, as assignee of the said *J. Graham* (to wit, by reason of the relation of his, the plaintiff's, title as such assignee, to the time of the bankruptcy of the said *J. Graham*, though not then appointed to be such assignee) was the owner of and entitled to the possession of the goods in the declaration mentioned, as of his property as such assignee as aforesaid. And the said *J. Graham* was then (subject only to such title of the plaintiff as aforesaid, as such assignee by such

(*a*) See *Pearson* v. *Graham*, 2 N. & P. 636.

relation as aforesaid,) possessed of and entitled to the same goods, and thereupon, after the bankruptcy of the said *J. Graham*, and more than two calendar months before the date and issuing of the said fiat, while the plaintiff was such owner, and so entitled as in the plea aforesaid, and while the said *J. Graham* was so possessed and entitled as aforesaid, subject as aforesaid, and before the committing of the said grievance, to wit, on &c., the said *Rogers* bonâ fide bought at a fair price, to wit, &c., of and from the said *J. Graham*, and the said *J. Graham* then bonâ fide sold and delivered to the said *John Rogers*, at and for the said price, the goods in the declaration mentioned. And the said *Rogers* and *Penn* aver, that at the time of the said purchase, sale and delivery, the said *Rogers* and *Penn* had not, nor had either of them, any notice of any prior act of bankruptcy by the said *J. Graham* committed, whereupon and whereby, before the committing of the grievance in the declaration supposed, to wit, on &c., the said *Rogers* became and was, and until and at the committing of the said grievance, continued to be possessed of the said goods as of his own property. And the said *Rogers* being so possessed, to wit, at the said time when &c., in the declaration mentioned, the said *Rogers*, in his own right, and the said *Penn*, as his servant and by his command, converted and disposed of the said goods and chattels in the declaration mentioned to their own use, as they lawfully might for the cause aforesaid, which is the same grievance as in the declaration mentioned; without this, that at the time of the said conversion and disposition, the said goods and chattels, or any or either of them, were the property of the plaintiff as assignee as aforesaid, or of right belonged or appertained to him as assiguee as aforesaid. And of this the defendants *Rogers* and *Penn* put themselves upon the country, &c.

Special demurrer, the principal grounds of which were the following: 1. That the plea in the inducement confesses a property in the plaintiff as assignee of the goods mentioned, and then confesses a conversion by the sale to *Rogers*, and

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alleges matter in avoidance, which the plaintiff has no opportunity of traversing or replying to, and that after alleging such matter the plea ought to have concluded with a verification. 2. That it is double in stating two conversions, and attempting to give distinct answers to each. 3. That the traverse is repugnant to the inducement. 4. That the traverse is made to a supposed conversion not alleged in the declaration, and raises an immaterial issue. 5. That, supposing it to be necessary for the plaintiff to new assign, it has, by tendering issue, prevented the plaintiff from doing so. 6. That the declaration complains of a joint conversion by the three defendants, and that the plea attempts to justify a conversion by two of them alone, and avers that it is the same grievance as in the declaration is mentioned.

Wightman, in support of the demurrer (*a*). The plea in the inducement admits the plaintiff's title, and ought not therefore to have afterwards traversed it. The traverse is material, so that the plaintiff could not pass it by and plead to the inducement. The inducement sets up a good answer by way of confession and avoidance; the subsequent traverse therefore is bad; 1 *Wms. Saund.* 207 e, (n. 5). The traverse also has the effect of preventing the plaintiff from new assigning.

Cresswell, contrà. By the rule of Hilary term, 4 *Will.* 4, No. 13, "all special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country; provided that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial." This shews that the plea properly concludes to the country. The plaintiff is not prejudiced by the plea so concluding; if the traverse is material he might have joined issue, and if it is immaterial he might have replied to the inducement. [*Coleridge* J. That might always

(*a*) Nov. 30, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

have been done when the traverse was immaterial. The rule merely saves the old right.] By joining issue on the traverse he would not have admitted the truth of the matters contained in the inducement; *Craven* v. *Sanderson* (*a*). It is not clear that the plaintiff might not have new assigned, notwithstanding the traverse, but if he cannot it is the fault of the rule itself. How can the traverse be objected to as coming after a confession and avoidance, for there is in the inducement no confession and avoidance of any conversion by the defendants *Rogers* and *Penn*? A sale by the bankrupt to *Rogers* was no conversion by both the pleading defendants. It was not necessary for the plea to take any notice of the third defendant; any one defendant might of course have answered for himself.

Wightman in reply. The inducement clearly contains a confession and avoidance, and is in itself a special plea. After admitting the plaintiff's property it should have stopped short with a verification of the circumstances, which had shewn that there had been no conversion, and not have gone on to traverse the property in the plaintiff, which had been admitted. So in trespass, if the defendant pleads a sale in market overt, he need not traverse the plaintiff's property; *Com. Dig.* tit. Pleader, (G 5) citing 5 *H.* 7, 14 a. *Stancliffe* v. *Hardwick* (*b*) may be conidered as an authority that a defence like the present should be specially pleaded in confession and avoidance, so as to give the plaintiff an opportunity of traversing it.

Cur. adv. vult.

Lord DENMAN C. J.—This was a demurrer to the plea in an action of trover at the suit of the assignee of a bankrupt. Many grounds of demurrer were assigned, but the principal ground, into which indeed all the others may be resolved, was, that a special traverse was taken by the plea

(*a*) 4 A. & E. 666; *S. C.* 2 N. & P. 641.

(*b*) 2 C. M. & R. 1.

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after the allegation of matter professing to be inducement, but which amounted in truth to confession and avoidance. No doubt can be entertained but that this ground of demurrer is fatal, if it be established to exist. See the cases collected in 1 *Saund.* 207 e, *Salmon* v. *Smith*, note (5), and 1 *Saund.* 21, note (2). The law with respect to special traverses is well stated in *Stephen* on Pleading, 205, et sqq.

Upon attentively considering this plea, we are satisfied that the introductory part of it does confess and avoid the declaration, and therefore that the traverse is idle and the plea bad. The declaration charges a joint conversion by the defendants. The plea admits the property in the goods to have been in the plaintiff by operation of law, but alleges a bonâ fide purchase of it by one of the defendants, more than two months before the issuing of the fiat in bankruptcy, without notice of an act of bankruptcy; it then alleges the possession of the goods by that defendant, and the joint conversion by both. This is a direct confession of a conversion and an avoidance of it, by shewing that it was a rightful conversion by reason of the bonâ fide purchase.

It may be very doubtful whether the plaintiff could have treated the traverse of the goods, being the property of the plaintiff at the time of the conversion, as an *immaterial* traverse, and pleaded over to the introductory matter,—a power which we may observe was not *given* by the rule of Hilary term, 4 *Will.* 4, but only *preserved* by it. It is sufficient to say that he was not bound so to treat it, and it is obvious, that if he had, the question as to the traverse being immaterial or not, must have been raised by a demurrer on the part of the defendants. Judgment must be for the plaintiff.

Judgment for the plaintiff, with leave to defendant to amend.

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CASE IN THE EXCHEQUER CHAMBER.

SMITH *v* TYSON.

Monday, December 3d.

A custom for *all* victuallers to erect booths on a common, being parcel of the waste of a manor (selected by the lord for holding fairs yearly, every fortnight), and to place *posts* and tables there, a reasonable time before the Monday next after the Feast of Pentecost, and to continue them so erected until the Feast of All Souls, each paying therefore to the lord a compensation 2*d.* is good.

ERROR from the Court of Queen's Bench. The pleadings will be found in the report of the case in that Court (*a*). The present case was argued in the vacation after Michaelmas term, on the 3d December, before *Tindal* C. J., *Vaughan* J., *Parke* B., *Bosanquet* J., *Alderson* B., *Gurney* B. and *Coltman* J., by *W. H. Watson* for the plaintiff in error, and *Cresswell* for the defendant in error (*b*).

Cur. adv. vult.

TINDAL C. J., on a subsequent day in the vacation, delivered judgment as follows:—In this case, the issues raised on the third and fifth pleas, which go to the whole action, have been found for the defendant below, and judgment has been given thereon accordingly, in his favour; and this writ of error is brought to reverse such judgment, on the ground that the custom set forth in those pleas, and upon which the whole of the defendant's justification rests, is unreasonable, and therefore bad in law.

The third plea, (and it will be unnecessary to give a separate consideration to the fifth, as the same objections apply equally to both,) begins by stating the existence of a fair by prescription, to be held on some part of the commons and waste grounds of the manor of Westward, in the county of Cumberland, to be appointed for that purpose by the lord of the manor, on Monday after the Feast of Pentecost, in every year, and afterwards on each alternate Monday, until the Feast of All Souls, and then alleges a custom within the said manor, that every liege subject of the realm exercising the trade or calling of a victualler, at a reasonable

(*a*) 1 N. & P. 784.

(*b*) The arguments did not differ materially from those in the Court below, it has therefore been deemed unnecessary to set them out in this report. The grounds of error will be found embodied in the judgment.

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time before the first day of the fair, had been used and accustomed, and of right ought to enter upon that part of the commons or waste grounds which had been set out for holding of the fair, and for the more conveniently carrying on his trade, to erect a booth and stall, and to put and place posts and tables there, and to continue the same so erected, put and placed, until a reasonable time after the last of the said fairs so holden, yielding and paying therefore to the lord of the manor for the time being the sûm of 2*d.* when lawfully demanded. The plea then proceeds to justify the trespasses alleged to have been committed under this custom. The existence of the prescriptive right to the fair is admitted upon the pleadings, and nothing is traversed but the existence of the custom, which custom is found by the jury, and the question before us is, whether the custom is a good custom, or unreasonable, and therefore void in law.

It is an acknowledged principle, that to give validity to a custom, which has been well described to be "an usage which obtains the force of law, and is in truth the binding law within a particular district or at a particular place, of the persons and things which it concerns" (see *Davys's* Reports, 32), that it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. Now of these several requisites to the validity of a custom, the only one which is brought in question on the present occasion is, whether the custom is reasonable or not; and this is a question which it belongs to the judges of the land to determine.

The question, what customs are reasonable, and what are not, is one upon which the books are not altogether silent. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law; for "consuetudo ex certâ causâ rationabili usitatâ privat communem legem" (*Litt.* s. 37), as the custom of gavelkind and borough-English, which are directly contrary to the law of Descent: or again, the custom of Kent, which is contrary to the law of Escheats; nor is a custom unreasonable be-

cause it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth; as the custom to turn the plough upon the headland of another, in favour of husbandry; or to dry nets on the land of another, in favour of fishing, and for the benefit of navigation.

But on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason, for it could not have had a reasonable commencement. As a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad, for it is injurious to the multitude, and beneficial only to the lord, (2 *Hen.* 4, 24). So a custom that the lord of the manor shall have 3*l.* for every pound breach of any stranger (*Com. Dig.* Copyhold, (S 13),) or that the lord of the manor may detain a distress taken upon his demesnes, until fine be made for the damage at the lord's will (*Litt.* s. 212); in all these instances, and many other similar customs, which are to be found in the books, the customs themselves are held to be void, on the ground of their having had no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate. But the reasonableness of the custom, in the present case, is not impeached on any ground of this nature. The present custom is in fact in favour of the many; and the only party against whom it is set up, and by whom it is now opposed, is the lord of the manor. The grounds upon which this custom is contended to be void on the present occasion, appear to be reducible to three; first, that it is so general, that it ceases to be a custom or pleadable as such, but is part of the common law; secondly, that by reason of its generality and extent, it cannot be carried into execution, and cannot therefore be considered as a reasonable custom; and lastly, that the right claimed amounts to a profit à prendre out of land, and cannot therefore be claimed as a customary right.

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As to the first objection, admitting for the purpose of argument, that a custom, which would comprehend within it all the liege subjects of the crown, would be bad, on the ground of its amounting to the common law: we think the custom before us is not of that description. For in the present custom there are three restrictions, which necessarily limit its generality. The parties who claim the benefit of it must be victuallers; they must be victuallers coming to keep the fair, and they must come at the precise period of the year at which the fair is fixed. Now under the description of victuallers, mentioned in the custom, we cannot consider that very large body of persons to be comprehended who in ancient times appear to have been classed under that designation by the statutes referred to in the argument; but we think the plea must be taken to speak in the language of the time at which it is pleaded; and as the only term used is that of victualler, it must be understood those only are comprehended who are now so termed, that is, persons authorized by law to keep houses of entertainment for the public. This removes the case at once from the application of the case of *Fitch* v. *Rawlings* (*a*) where the custom comprehended all the liege subjects of the crown being in the parish at any time.

But it is said that the number of these victuallers may be so large, and the space occupied by each so great, as that the whole portion of the common set out for the fair may be taken by them in exclusion of the rest. If this argument were to prevail, it is manifest that it would be equally applicable with respect to every particular branch of traders who frequent the fair—the sellers of corn or of cattle, the persons who deposit their cloth, the dealers in earthenware, and the like, might, with equal shew of reason, be stated by possibility to become occupiers of the whole ground, to the exclusion of the rest. But it is obvious that this is not an argument against the custom being reasonable in its original commencement, or against the prescription

(*a*) 2 H. Bl. 393.

for the fair being a reasonable prescription, it is an objection only as to the mode of exercising the rights so claimed, whether under the custom or the prescription. An inconvenience of this description will provide its own remedy; if it occurs once, it will not be likely to occur again. It is in the highest degree improbable that it should ever occur at all. A little previous inquiry will at all times prevent its recurrence. And in *Bennington* v. *Taylor* (*a*), where it was objected that a prescription was uncertain and therefore void, which claimed toll for a stall, and the land "propè et circà stallam, &c." the objection was not allowed; for this, it was said, "shall be ascertained by the usage of the fair." And these are precisely the points of consideration to which the judges must advert when called upon to determine whether the custom is void or not. It is not void as being against law; and if alleged to be void because inconvenient in a high degree in its enjoyment, and therefore unreasonable, they must look to the probabilities of the case, and be satisfied that the inconvenience is real, general and extensive, before they hold a custom bad upon that ground, which a jury have found to exist and to have been acted upon from beyond the time of legal memory.

As to the objection that this is a bad custom as against the owner of the soil, that all the authorities confine a claim under a custom to matters of easement only, whereas this is a matter of profit in alieno solo, inasmuch as the soil must be disturbed by the erection of the stall; admitting this to be the case, which is left extremely doubtful on the pleadings in this case, yet the distinction between this custom and others to which reference was made is, that it gives a certain profit to the owner of the soil, for the use of the same; and whether that is a full compensation or not, is not the question. At the early time at which this custom originated it may have been a profit to the lord, and at all events it may have been an object to him with respect to the profits of his fair, to give encouragement to those who

(*a*) 2 Lutw. 1517.

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would erect booths and stalls for the entertainment of strangers coming to the fair. It is clear that a prescription for a certain toll by way of stallage is good, notwithstanding toll and stallage are different things, as was held in the case of *Bennington* v. *Taylor* (*a*), above referred to, and if the lord of the fair can justify distraining for such toll under a prescription, there seems no reason why the person who uses the stall on payment of the tolls, and who cannot prescribe in a que estate, or in himself and his ancestors, being a stranger, should not justify under such a custom as the present.

The custom, in fact, comes at last to an agreement, which has been evidenced by such repeated acts of assent on both sides, from the earliest times, beginning before time of memory and continuing down to our own times, that it has become the law of the particular place.

We therefore think the custom set out on the pleadings is a good custom, and affirm the judgment of the Court of Queen's Bench.

Judgment affirmed.

(*a*) 2 Lutw. 1517.

END OF THE SITTINGS IN BANC AFTER MICHAELMAS TERM.

HILARY TERM,

IN THE SECOND YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,

Lord DENMAN C. J. — WILLIAMS J.
LITTLEDALE J. — COLERIDGE J.

In the Bail Court,
PATTESON J.

MEMORANDUM.

1839.

THE Hon. Mr. Justice *Park* died in Michaelmas vacation (the 8th December). On the 9th January, 1839, the Right Hon *Thomas Erskine*, late Chief Justice of the Court of Bankruptcy, was called to the degree of the Coif, and gave rings with the motto "Judicium Parium:" on the same day he was appointed one of the Judges of the Court of Common Pleas, where he took his seat on the first day of Hilary term.

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Hilary Term, 1839.

IT IS ORDERED, that the following Forms of Writs, framed by the Judges, pursuant to the statute 1 & 2 Victoria, c. 110, s. 20, be used from and after the first day of March next, with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary, but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

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REGULA GENERALIS.

No. I.

Writ of elegit upon a judgment in the Court of Q. B. in an action of assumpsit.

VICTORIA, by the Grace of God, of the United Kingdom o Great Britain and Ireland Queen, Defender of the Faith, to th Sheriff of , greeting. Whereas *A. B.*, lately in our Court befor us at Westminster, by the judgment of the same Court, recovere against *C. D.* , which in our said Court before us wer adjudged to the said *A. B.*, for his damages which he had sus tained, as well on occasion of the not performing of certain pro mises and undertakings then lately made by the said *C. D.* t the said *A. B.*, as for his costs and charges by him about his sui in that behalf expended, whereof the said *C. D.* is convicted, a appears to us of record; and afterwards the said *A. B.* came int our said Court before us, and according to the form of the sta tute in such case made and provided, chose to be delivered t him all the goods and chattels of the said *C. D.* in your baili wick, except his oxen and beasts of the plough, and also all suc lands, tenements, rectories, tithes, rents, and hereditaments, in cluding lands and hereditaments of copyhold or customary te nure in your bailiwick, as the said *C. D.*, or any person in trus for him, was seised or possessed of on the day of , i the year of our Lord , on which day the judgment afore said was entered up, or at any time afterwards, or over which the said *C. D.* on the said day of (*a*), or at any time after wards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the damages aforesaid, together with interest upon the said sum of , at the rate of four pounds per centum per annum, from the day of , in the year of our Lord (*b*) shall have been levied. Therefore we command you, that, without delay, you cause to be delivered to the said *A. B.* by a reasonable price and extent all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, recto-

(*a*) The day on which the judgment was entered up.

(*b*) The day on which the judgment was entered up; or in case the judgment was entered up prior to the first of October 1838, say "from the first day of October, in the year of our Lord 1838."

ries, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on the said day of (*a*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of , in the year of our Lord .

No. II.

Writ of elegit on a rule made in the Court of Q. B. for payment of money.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of , greeting. Whereas lately in our Court before us at Westminster, by a rule of the said Court entitled, &c. [*as the case may be,*] the sum of was by the said Court ordered to be paid by *C. D.* to *A. B.*, and afterwards the said *A. B.* came into our said Court before us, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of, on the day of , in the year of our Lord , on which day the said rule was made, or at any time afterwards, or over which the said *C. D.* on the said day of (*b*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods

(*a*) The day on which the judgment was entered up.

(*b*) The day on which the rule was made.

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and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of , together with interest upon the said sum of , at the rate of four pounds per centum per annum, from the said day of , in the year of our Lord (*a*), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said *A. B.* by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*b*), or at any time afterwards, or over which the said *C. D.* on the said day of (*b*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of , together with interest as aforesaid, shall have been levied; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of , in the year of our Lord .

No. III.

Writ of elegit on a rule made in the Court of Q. B. for payment of money and costs.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of , greeting. Whereas, lately in our Court before us at Westminster, by a rule of the said Court, entitled, &c. [*as the case may be*] the sum of was by the said Court ordered to be paid by *C. D.* to *A. B.*, together with the costs of the said rule, which said costs were afterwards, on the day of

(*a*) The day on which the rule was made, or in case it was made prior to the first day of October, 1838, say "from the first day of October, in the year of our Lord 1838."

(*b*) The day on which the rule was made.

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, taxed and allowed by our said Court at the sum of . And afterwards the said *A. B.* came into our said Court before us, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any one in trust for him, was seised or possessed of on the day of , in the year of our Lord (*a*), or at any time afterwards, or over which the said *C. D.* on the said day of (*a*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of and , together with interest upon the said two several sums of and , at the rate of four pounds per centum per annum, from the said day of (*b*), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*c*), or at any time afterwards, or over which the said *C. D.*, on the said day of (*c*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of and , to-

(*a*) The day on which the costs of the rule were taxed.

(*b*) The day on which the costs of the rule were taxed, or in case that day were prior to the first of October 1838, say "from the first day of October, in the year of our Lord 1838."

(*c*) The day on which the costs of the rule were taxed.

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gether with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of , in the year of our Lord .

No. IV.

Writ of elegit on a judgment of an inferior Court in an action of assumpsit removed into the Court of Q. B.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of , greeting. Whereas *A. B.*, lately in [*insert the style of the Court*], by the judgment of the said Court, recovered against *C. D.* the sum of , which in the said Court were adjudged to the said *A. B.* for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings then lately made by the said *C. D.* to the said *A. B.*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record. And whereas the said judgment was afterwards on the day of , in the year of our Lord , removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster [*or*, "of , one of the Justices of our said Court before us at Westminster," *as the case may be*], in pursuance of the statute in that case made and provided, and the costs attendant upon the application for the said order and upon the said removal were afterwards, on the day of , in the year of our Lord , taxed and allowed by our said Court before us at Westminster at the sum of . And afterwards the said *A. B.* came into our said Court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of , in the year of our Lord aforesaid (*a*), or at any time afterwards, or over which the said *C. D.*, on the said day of (*a*), or at any time afterwards, had any disposing

(*a*) The day on which the costs of removing the judgment were taxed.

power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid and the said costs so taxed and allowed by our said Court at Westminster as aforesaid, together with interest upon the said two several sums of and , at the rate of four pounds per centum per annum, from the day of (*a*), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any one in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.*, on the said day of (*a*), or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, and the said costs so taxed and allowed by our said Court before us at Westminster as aforesaid, and interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of , in the year of our Lord .

No. V.

Writ of elegit on an order for payment of money, made in an inferior Court and removed into the Court of Q. B.

VICTORIA, &c. to the Sheriff of greeting. Whereas lately in [*insert the style of the Court*], by a rule of the said Court entitled, &c. [*as the case may be*] the sums of and were by the said Court ordered to be paid by *C. D.* to *A. B.*, and whereas the said rule was afterwards, on the day of in the

(*a*) The day on which the costs of removing the judgment were taxed.

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year of our Lord removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster [*or* " of one of the justices of our said Court before us at Westminster," *as the case may be*], in pursuance of the statute in that case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards, on the day of in the year of our Lord taxed and allowed in our said Court before us at Westminster at the sum of ; and afterwards the said *A. B.* came into our said Court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of in the year of our Lord (*a*), or at any time afterwards, or over which the said *C. D.* on the day of (*a*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of and together with interest on the said two several sums of and at the rate of four pounds per centum per annum, from the said day of (*a*), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any one in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on the day of (*a*), or at any time afterwards, had any disposing power which he might without the assent of any other person exercise for his own benefit; to hold the said goods and chattels

(*a*) The day on which the costs of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

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to the said *A. B.* as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of and together with interest as aforesaid, shall have been levied; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of in the year of our Lord

No. VI.

Writ of elegit on a rule for payment of money and costs made in an inferior Court and removed into Q. B.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting. Whereas lately in [*insert the style of the Court*], by a rule of the said Court, entitled, &c. [*as the case may be*], the sum of was by the said Court ordered to be paid by *C. D.* to *A. B.*, together with the costs of the said rule, which said costs were afterwards, on the day of in the year of our Lord taxed and allowed by the said Court at the sum of ; and whereas the said rule was afterwards, on the day of in the year of our Lord removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster [*or* "of one of the justices of our said Court before us at Westminster," *as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards on the day of in the year of our Lord taxed and allowed in our said Court before us at the sum of ; and afterwards the said *A. B.* came into our said Court before us at Westminster, and according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*a*), or

(*a*) The day on which the costs of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

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at any time afterwards, or over which the said *C. D.* on the said (*a*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of and and together with interest upon the said three several sums of and and at the rate of four pounds per centum per annum, from the said day of (*a*), shall have been levied. Therefore we command you, that without delay you cause to be delivered to the said *A. B.*, by a reasonable price and extent, all the goods and chattels of the said *C. D.* in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said *C. D.*, or any person in trust for him, was seised or possessed of on the said day of (*a*), or at any time afterwards, or over which the said *C. D.* on the said day of (*a*), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said *A. B.*, as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of and and together with interest as aforesaid, shall have been levied; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of in the year of our Lord

No. VII.

Writ of fieri facias on a judgment in the Court of Q. B., in an action of assumpsit.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting. We command you that of the goods and chattels of *C. D.* in your bailiwick, you cause to be made

(*a*) The day on which the costs of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

which *A. B.* lately in our Court before us at Westminster recovered against him for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said *C. D.* to the said *A. B.*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record, together with interest upon the said sum of at the rate of four pounds per centum per annum, from the day of in the year of our Lord (*a*), on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said *A. B.* for his damages and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of in the year of our Lord

No. VIII.

Writ of fieri facias on an order of the Court of Q. B. for payment of money.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting. We command you that of the goods and chattels of *C. D.* in your bailiwick, you cause to be made which lately in our Court before us at Westminster, by a rule of our said Court entitled, &c. [*as the case may be*], were by the said Court ordered to be paid by the said *C. D.* to *A. B.*, and that of the said goods and chattels of the said *C. D.* in your bailiwick, you further cause to be made interest upon the said sum of at the rate of four pounds per centum per annum, from the day of in the year of our Lord (*b*), on which day the said rule was made, and have that money, together with such interest as aforesaid, before us at Westminster

(*a*) The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord 1838," omitting the words "on which day the judgment aforesaid was entered up."

(*b*) The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord 1838," omitting the words "on which day the said rule was made."

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immediately after the execution hereof, to be rendered to the said *A. B.* for the said sum of money so ordered to be paid by the said *C. D.* to the said *A. B.*, and for interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of in year of our Lord

No. IX.

Writ of fieri facias on an order of the Court of Q. B. for payment of money and costs.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting. We command you that of the goods and chattels of *C. D.* in your bailiwick, you cause to be made which lately in our Court before us at Westminster, by a rule of our said Court entitled, &c. [*as the case may be*], were by the said Court ordered to be paid by the said *C. D.* to *A. B.*, together with the costs of the said rule, which said costs were afterwards, on the day of in the year of our Lord taxed and allowed by our said Court at the sum of ; and that of the said goods and chattels of the said *C. D.* in your bailiwick, you further cause to be made interest upon the said two several sums of and at the rate of four pounds per centum per annum, from the said day of in the year of our Lord (*a*), and have that money, together with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said *A. B.* for the said sum of money so ordered to be paid by the said *C. D.* to the said *A. B.*, and for costs and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of in the year of our Lord

(*a*) The day on which the costs of the rule were taxed, or if that were prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord 1838."

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Writ of fieri facias on a judgment of an inferior Court in an action of assumpsit, removed into the Court of Queen's Bench.

No. X.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting. We command you, that of the goods and chattels of *C. D.* in your bailiwick, you cause to be made which *A. B.* lately in [*insert the style of the Court*], by the judgment of the said Court, recovered against the said *C. D.* for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said *C. D.* to the said *A. B.*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *C. D.* is convicted, as appears to us of record; and which judgment was afterwards, on the day of in the year of our Lord removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster, [*or* "of one of the justices of our said Court before us at Westminster," *as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order, and upon the said removal, were, on the day of in the year of our Lord taxed and allowed by our said Court before us at Westminster, at the sum of : And we further command you, that of the said goods and chattels of the said *C. D.* in your bailiwick, you further cause to be made the said sum of (*a*), together with interest on the said two several sums of and at the rate of four pounds per centum per annum, from the said day of in the year of our Lord (*b*); and that you have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said *A. B.* for his damages aforesaid, and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf: and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of in the year of our Lord

(*a*) The costs attendant upon the removal of the judgment out of the inferior Court into the Court of Queen's Bench.

(*b*) The day on which the costs of removal were taxed.

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No. XI.

Writ of fieri facias on an order for payment of money made in an inferior Court, and removed into the Court of Queen's Bench.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting. We command you, that of the goods and chattels of *C. D.* in your bailiwick, you cause to be made which lately in [*insert the style of the Court*], by a rule of the said Court, entitled, &c. [*as the case may be*], were by the said Court ordered to be paid by the said *C. D.* to *A. B.*, and which rule was afterwards on the day of in the year of our Lord removed into our Court before us at Westminster, by virtue of an order of our said Court before us at Westminster [*or* "of one of the justices of our said Court before us at Westminster," *as the case may be*], in pursuance of the statute in that case made and provided; and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the day of in the year of our Lord taxed and allowed by our said Court before us at Westminster, at the sum of : And we further command you, that of the said goods and chattels of the said *C. D.* in your bailiwick, you further cause to be made the said sum of (*a*), together with interest on the said two several sums of and at the rate of four pounds per centum per annum, from the said day of (*b*) and that you have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said *A. B.* for the said monies by the said rule first above mentioned, ordered to be paid by the said *C. D.* to the said *A. B.*, and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, the day of in the year of our Lord

No. XII.

Writ of fieri facias on an order for payment of money and costs made in an inferior Court and removed into the Court of Q. B.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriff of greeting. We command you, that of the goods and chattels of *C. D.* in your bailiwick, you cause to be made

(*a*) The costs of removing the rule of the inferior Court into the Court of Queen's Bench.

(*b*) The day on which the costs of removing the rule of the inferior Court into the Court of Queen's Bench were taxed.

which lately in [*insert the style of the Court*], by a rule of the said Court entitled, &c. [*as the case may be*], were by the said Court ordered to be paid by the said *C. D.* to *A. B.*, and also for the costs of the said rule by the said Court also ordered to be paid by the said *C. D.* to the said *A. B.*, which said rule was afterwards, on the day of in the year of our Lord removed into our Court before us at Westminster, by an order of our said Court before us at Westminster [*or* "of one of the justices of our said Court before us at Westminster," *as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order, and upon the said removal were, on the day of in the year of our Lord taxed and allowed by our said Court before us at Westminster, at the sum of And we further command you, that of the said goods and chattels of the said *C. D.* in your bailiwick, you further cause to be made the said sum of (*a*), together with the interest on the said three several sums of and and at the rate of four pounds per centum per annum, from the said day of in the year of our Lord (*b*), and that you have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said *A. B.* for the monies by the said rule first above mentioned, ordered to be paid by the said *C. D.* to the said *A. B.*, and for costs and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, *Thomas* Lord *Denman*, at Westminster, on the day of in the year of our Lord

(Signed)	DENMAN,	E. H. ALDERSON,
	N. C. TINDAL,	J. PATTESON,
	ABINGER,	J. GURNEY,
	J. LITTLEDALE,	J. WILLIAMS,
	J. VAUGHAN,	J. T. COLERIDGE,
	J. PARKE,	T. COLTMAN,
	J. B. BOSANQUET,	T. ERSKINE.

(*a*) The costs of removing the rule from the inferior Court into the Court of Queen's Bench.

(*b*) The day on which the costs of removing the rule from the inferior Court into the Court of Queen's Bench were taxed.

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Friday, January 11th.

BURROUGHS *v.* HODGSON.

1. Debt for 6*l.* for goods sold and delivered. Pleas, as to all but 1*l.* 13*s.*, nunquam indebitatus, and as to 1*l.* 13*s.*, *parcel*, &c. the Westminster Court of Requests' Act, with an averment "that the defendant was not indebted to the plaintiff to a greater amount than the said sum of 1*l.* 13*s.*" The defendant demurred specially to the latter plea, on the grounds, first, that it was an answer to the whole action, and was only pleaded to part; second, that the plaintiff could not safely take issue upon it:— Held, that as a traverse of the defendant not being indebted in more than 1*l.* 13*s.*, would have raised an immaterial issue, the plea was bad.

Semble, that the plea was not bad on the former ground, as it must be taken in connection with the previous plea of nunquam indebitatus to the residue, and that the two pleas formed but one answer to the declaration.

2. Although the rule of Court, 9 *Geo.* 4, directs the pleadings demurred to only to be set out in the demurrer books, the Court on argument may look to the whole record.

DEBT. The declaration stated the defendant to be indebted to the plaintiff, on the 10th October, 1836, in 6*l.*, for goods sold and delivered, and in 6*l.* on an account stated.

Plea, as to the sum of 1*l.* 13*s.* 8*d.*, parcel &c., the defendant says *actionem non*, because he says that the 10th day of October next after the making, the 6 & 7 *Will.* 4, c. cxxxvii. (local and personal), (the Westminster Court of Requests' Act), elapsed before the commencement of this suit. Averment, that at the time of the commencement of the suit, the defendant was not indebted to the plaintiff to a greater amount than the said sum of 1*l.* 13*s.* 8*d.* The defendant then pleaded the usual plea, bringing himself within the act, and concluded thus: "and the defendant further says, that before and at the commencement of this suit, the said debt of 1*l.* 13*s.* 8*d.*, being a debt not exceeding 40*s.*, was recoverable by the plaintiff against and from the defendant in the said Court &c., by virtue of the said act; and that the plaintiff brought this action as to the sum of 1*l.* 13*s.* 8*d.* in this Honourable Court, contrà formam statuti. Verification.

Special demurrer, assigning for cause that the plea begins as an answer to part of the declaration, viz. the said sum of 1*l.* 13*s.* 8*d.*, parcel &c. only, thereby impliedly admitting that the residue of the demand in the declaration is due to the plaintiff, and yet the plea contains an answer (and is by its nature and by the act of parliament therein mentioned an answer) to the whole of the declaration, which is inconsistent and repugnant; and that as the plea is pleaded to the said sum of 1*l.* 13*s.* 8*d.*, parcel &c. only, the plaintiff cannot consistently, or without evident irrelevancy, take

issue upon the averment in the plea, that at the time of the commencement of this suit the defendant was not indebted to the plaintiff to a greater amount than the said sum of 1*l.* 13*s.* 8*d.*, and that the plea ought to have been pleaded to the whole of the declaration, and not to a part of it only.

W. H. Watson argued in support of the demurrer, in Michaelmas term last (*a*). The plea is pleaded only to part of the declaration, and yet contains an answer to the whole, it is therefore bad on special demurrer: *Gray* v. *Pindar* (*b*). Formerly such a plea was a discontinuance of the action; Serjt. *Williams*'s note to *Earl of Manchester* v. *Vale* (*c*); but since the statute 4 & 5 *Ann.* c. 16, which allows of double pleading, it is only bad on demurrer. [Lord *Denman* C. J. Was the general issue pleaded here?] Most likely. [*Patteson* J. Although our rule (*d*) directs only such parts of the pleadings, to which the demurrer relates, to be set out, it may be very often material to look at the whole of the record.] If there is a plea of nunquam indebitatus, it does not cure the objection. Secondly, there is in the plea no averment which the plaintiff can safely traverse. The plea ought to have been addressed to the whole cause of action. [*Patteson* J. How can that be? for suppose the plaintiff claimed 100*l.* in his declaration, still the plea of a forty shillings Court of Requests' Act would be apparently no answer.] It might be so pleaded by averring that the defendant is not indebted to the amount of 40*s.*, which is the usual form; and if the issue is then found against the plaintiff, the defendant is entitled to judgment. But suppose the plaintiff here had traversed the allegation that the defendant was not indebted to a greater sum than 1*l.* 13*s.* 8*d.*, and the jury had found that he was indebted in the sum of 1*l.* 13*s.* 9*d.*, that would have been an immaterial finding. [*Patteson* J. You

(*a*) Nov. 15th, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*b*) 2 B. & P. 427.

(*c*) 1 Wms. Saund. 28, n. (3).

(*d*) Hil. 8 & 9 *Geo.* 4, 1 Mann. & R. 662.

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might have replied that the defendant was indebted to you in a sum above 40*s.*] Perhaps so, but then the plea would not be traversed. A plaintiff ought to be enabled to traverse some specific allegation of the plea.

E. V. Williams, contrà. Although no doubt nunquam indebitatus is pleaded to the rest of the declaration, still, as it cannot be contended that the goodness or badness of the plea demurred to depends on what other plea may be pleaded, the Court will not look to the rest of the record. If it is contended that this plea is bad, because it is joined with a plea of nunquam indebitatus, it should have been demurred to as a misjoinder. Suppose that the other plea had been the Statute of Limitations, in what other form than the present could the defence as to 1*l.* 13*s.* 8*d.* have been pleaded? [Lord *Denman* C. J. In the view I take of the record, nunquam indebitatus as to part and of the Court of Requests' Act to the residue, form but one plea.] If that is so, the plea is unexceptionable, and that was the form of the plea in *Gardner* v. *Jessop* (*a*). Suppose the plea had been pleaded to the whole debt, and on issue being taken upon the averment of residence within the city of Westminster, a verdict had been found against the defendant, the whole plea would have failed, and the action being in debt, the plaintiff would have had judgment for the whole debt alleged in the declaration. It is true that this might have been avoided, by the defendant pleading the general issue. But the rules of pleading depend on the common law, and not on the statute of *Anne*, which allows the defendant to plead several matters. The defendant is not obliged to take the benefit of that statute, and the case is to be looked at as if it were before that statute, and the defendant had been forced to rely on a single plea. As to the objection that the plea begins as an answer to part only, and yet contains an answer to the whole declaration, in *Gray* v. *Pindar* (*b*), the addressing the plea to the whole decla-

(*a*) 2 Wils. 42. (*b*) 2 B. & P. 427.

ration was wholly unnecessary with reference to the matter as to which the plea was pleaded. But here the averment as to the 1*l.* 13*s.* 8*d.*, is part of the defence under the statute. The plea is not bad for containing an averment in itself a defence, when inserted for the purpose of introducing another defence, on which the defendant relies. This is proved by the well-known case of the plea, that after the cause of action the plaintiff took husband, and that the husband afterwards released the defendant. There, though the coverture is itself a defence as well as the release, yet the averment of coverture does not vitiate, because it is a necessary introduction to that of the release (*a*). [*Patteson* J. How do you answer the objection that you have not made any averment on which the plaintiff could take a traverse?] The plaintiff could have easily replied that the debt amounted to more than 40*s.* It is not necessary that the traverse should follow the exact words of the preceding pleading. Indeed if this were done, it would in most instances be incorrect, for the traverse would be either too large or too narrow. The plea contains an averment which shews à fortiori that the debt was under 40*s.*

W. H. Watson, in reply. No answer has been given to *Gray* v. *Pindar* (*b*), that this plea professes to answer part, and yet is substantially an answer to the whole declaration. In *Gardner* v. *Jessop* (*c*), the plea was only pleaded as to 1*l.* 3*s.*, non assumpsit being pleaded to the residue. It is true the plaintiff might have framed a replication on which he might have succeeded, but the defendant is bound to plead a plea on which a traverse can be taken.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was an action of debt, for goods

(*a*) Dame *Audley*'s case, Moore, 25.

(*b*) 2 B. & P. 427.

(*c*) 2 Wils. 42.

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sold and delivered. The defendant pleaded as to all but 1*l.* 13*s.* 8*d.* that he never was indebted, and as to that sum the 6 & 7 *Will.* 4, c. cxxxvii, commonly called the Westminster Court of Requests' Act. This part of the plea contained amongst other averments the following: "And the defendant further says, that at the time of the commencement of this suit, he the defendant was not indebted to the plaintiff to a greater amount than the said sum of 1*l.* 13*s.* 8*d.*" The plaintiff demurred, and upon the argument two grounds of demurrer were insisted on; 1st, that the plea begins as an answer to part, but is in truth an answer to the whole of the declaration; 2dly, that no material issue can be taken on the averment above set forth, inasmuch as though the defendant should be found indebted in a greater amount than 1*l.* 13*s.* 8*d.*, yet if the amount were under 40*s.* the case would be equally within the Court of Requests' Act, and therefore the averment, in order to be traversable, ought to have been "that the defendant was not indebted to the amount of 40*s.*"

With respect to the first objection, it appears upon an examination of the precedents, that it has been usual to plead such a plea to the whole declaration. The form usually adopted is in truth a denial of part, and a confession and avoidance of the residue of the declaration, yet not shewing the parts in the introduction of the plea. On the present record, the parts are severed in the introduction to the plea, for the answer of "never indebted" to part and of the Court of Requests' Act to the residue, together form but one plea to the whole declaration, and in this respect the plea is more in conformity with the ordinary rules of pleading than that which is usually adopted. There is nothing inconsistent in the statement in the introduction, that the 1*l.* 13*s.* 8*d.* is "parcel of the several monies in which the defendant is in the declaration mentioned to have been indebted to the plaintiff," with a denial that he was in truth indebted in any further sum; and the peculiar nature of the defence given by the Court of

Requests' Act, makes it almost impossible to shape that defence according to the strict rules of pleading. But we are not obliged to determine this point, for upon the second objection we are of opinion that judgment must be given for the plaintiff. If any averment at all, as to the amount of the debt, be necessary, the form commonly used is clearly the correct and proper one, namely, that the defendant was not indebted to the plaintiff in any sums of money amounting to 40*s.* "or to the amount of 40*s.*" On such an averment a material issue might be taken, and though it is true that if the present averment be traversed and found for the defendant, it would be material and conclusive, yet if found for the plaintiff it would be otherwise. The plaintiff however is entitled to have the plea of the defendant so framed as that the averments in it, if traversed, will be material and conclusive, whichever way they may be found, and their not being so framed is a good ground of demurrer. If indeed the averment was immaterial, and might be struck out altogether, the plaintiff would have no ground to complain; but it is clear that the defendant must shew in some way upon the face of his plea that the cause of action is under 40*s.*, otherwise the jurisdiction of this Court is not taken away by the Court of Requests' Act.

The averment therefore cannot be said to be immaterial, and cannot be struck out. In the case of *Gardner* v. *Jessop* (*a*), the plea contained no such averment, and was in other respects similar to the present plea; but that case turned upon the replication, which raised an entirely different point, and the form of the plea was not discussed.

Judgment for the plaintiff.

(*a*) 2 Wils. 42.

1839.

Friday, January 11th.

Corporation property of a borough within the Municipal Corporation Act, 5 & 6 *Will.* 4, c. 76, the rents and profits of which are received by the treasurer of the borough under sect. 92 of that act, is not rateable to the poor.

The QUEEN *v.* The Mayor, Aldermen and Burgesses of LIVERPOOL.

ON an appeal against a rate for the borough of Liverpool, in the nature of a borough rate, the Liverpool quarter sessions confirmed the rate, subject to the opinion of this Court on the following case.

The several properties rated are the revenue of the municipal corporation of the borough of Liverpool, collected by their officers, who are paid by salaries, and by them paid over to the treasurer of the borough, to the account of the borough fund. Prior to the passing of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), these properties were rated to the relief of the poor, which rating was always acquiesced in; and these properties are now rateable to the poor, unless they are exempt under the new circumstances enacted by the Municipal Corporation Act, 5 & 6 *Will.* 4, c. 76.

The question for the opinion of the Court is, whether the mayor, aldermen and burgesses of the borough of Liverpool are now rateable to the relief of the poor in respect of these properties. If the Court shall be of opinion that the mayor, aldermen and burgesses of the borough of Liverpool are now rateable to the relief of the poor in respect of these properties, then the rate shall stand confirmed; but if the Court should be of a contrary opinion, then the rate shall be amended, by striking out of the same the said properties, and in respect thereto the names of the mayor, aldermen and burgesses, and the order of sessions for confirming the rate, so far as respects the said properties and the mayor, aldermen and burgesses in respect thereto, shall be quashed, and as to all other matters in the said rate and order, shall be confirmed.

The case was argued at the sittings in banc after last Michaelmas term (*a*).

(*a*) December 1st, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

Cresswell, *G. Henderson* and *Greaves*, in support of the order of sessions. The question in this case is, whether the 5 & 6 *Will.* 4, c. 76, contains any enactment to exempt corporate property from poor's rate. Sect. 92 of that act directs the rents and profits of the corporation property to be paid to the treasurer, and to be appropriated in a specified manner. The first inquiry is, what "rents and profits" mean. It is submitted that the expression means the rents and profits of the corporate estates, clear of all outgoings: if so, cadit quæstio, for poor's rate is undoubtedly an outgoing. The use of the term "rents and profits," shews that rents simply were not intended, but the net rents and profits. The term profits has received a judicial explanation in several cases, viz. in *Stile* v. *Tomson* (*a*), *Griffith* v. *Smith* (*b*), *Rex* v. *Joddrell* (*c*), which shew that profits do not mean gross profits. This construction clearly carries out the intention of the act, for it never could have been the meaning of the legislature to diminish the poor's rate by exempting the property of municipal corporations. If, however, this is not the right construction, the second inquiry is, whether the application of the borough fund is directed to such strictly public objects as to exempt it from poor's rate. In *Rex* v. *St. Giles, York* (*d*), where lands were purchased for erecting a lunatic asylum, they were held liable to poor's rate. So, in *Rex* v. *Agar* (*e*), the trustees of a methodist chapel were held rateable, although they applied the pew-rents solely in payment of salaries to preachers and of necessary expenses. Therefore it is not simply because the purposes to which a property may be dedicated are religious or charitable, that an exemption from poor's rate can be claimed. On the other hand, in *Rex* v. *Salter's Load Sluice* (*f*), the tolls taken under an act of parliament were appropriated for the purposes of the act, and for no other whatsoever, and

(*a*) 2 Dyer, 210 a.
(*b*) Moore, 753.
(*c*) 1 B. & Ad. 403.
(*d*) 3 B. & Ad. 573.
(*e*) 14 East, 256.
(*f*) 4 T. R. 730.

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were held therefore not rateable. *Rex* v. *The Inhabitants of Liverpool* (*a*) and *Rex* v. *The Trustees of the River Weaver* (*b*) were decided on the same principle. But on looking to the appropriation of the borough fund, it is clear that all the purposes to which it is to be applied are not public. First of all, it is to go in payment of the debts of the corporation. But the corporate debt may have been incurred for many private purposes, such as extravagant living on the part of the old corporation, the building of expensive premises, the payment of bond debts incurred in such expenses, &c. The corporation therefore, in this respect, are merely the trustees for private creditors; and the act of parliament only directs an appropriation which the general law would have required. It is clear that the whole of the fund may be disposed of in this way. The next provision directs the payment of salaries; but as no particular officers are specified, it lies with the corporation to dispose of the fund as they choose. Suppose they gave the mayor 5000*l.* a year, and other members of the council in proportion, would not this be a private purpose? And it is not enough that the appropriation is disposed of under an act of parliament; for *Rex* v. *Tewksbury* (*c*) shews that any thing short of an exclusive appropriation to public purposes creates a liability to rates. Then, the surplus is to be expended in public improvements. Suppose they built a market or a town-hall, or laid out money in a public promenade,—these are not public purposes, within the meaning of the decisions in *Rex* v. *St. Luke's* (*d*), *Rex* v. *St. Bartholomew the Less* (*e*), or *Rex* v. *Waldo* (*f*).

In most of those cases the difficulty was to find a rateable occupier; but it is found in this case that the corporation have a beneficial occupation, and when that is so, there is no distinction between the beneficial occupation of a

(*a*) 7 B. & C. 61; *S. C.* 9 D. & R. 780.

(*b*) 7 B. & C. 70, n.; *S. C.* 9 D. & R. 788.

(*c*) 13 East, 155.

(*d*) 2 Burr. 1053.

(*e*) 4 Burr. 2435.

(*f*) Cald. 358.

corporation and of an individual: *Rex* v. *Gardner* (*a*). In that case the master and fellows of Catherine Hall purchased ground, and converted it into a promenade; and they were held rateable. It is clear that even if a workhouse be erected out of the parish, it is rateable to the parish where it stands: *Governors of the Poor of Bristol* v. *Wait* (*b*). But it appears, by sect. 7 of 5 & 6 *Will.* 4, c. 76, that the limits of the borough and of the parish of Liverpool may be by no means co-extensive. Supposing then (as is the fact) that the borough extends over more than one parish,—if the corporate property is not rateable in the parish where it stands, it is very unfair on that parish; for if, before the act passed, an assessment had been made on 50,000*l.* of corporate property,—after the act passed the rate on that sum would pass from the parish chest to the borough fund, to be expended on improvements in a distant part of the borough, from which the parish might derive no advantage. The parish then would require an additional poor's rate; and yet it was clearly the intention of the legislature that the subject should not be taxed at all for public improvements. *The Attorney-General* v. *Aspinall* (*c*) will perhaps be relied on, to shew that the purposes to which the borough fund are to be applied are public; but the decision of the Lord-Chancellor turned upon the point of the corporation being trustees, and if any one of the purposes, such as the payment of debts, raised a trust, that was sufficient, without inquiry whether the purposes were public or private. They also cited *Rex* v. *Pugh* (*d*), *Rex* v. *Birmingham Canal Company* (*e*), *Rex* v. *Scalcoates* (*f*), *Rex* v. *Kingswinford* (*g*).

Wightman and *Murphy*, contrà. The simple question is, whether the corporation are not trustees of the borough

(*a*) 1 Bott, 6th ed., 167.
(*b*) 5 A. & E. 1; *S. C.* 6 N. & M. 383.
(*c*) 2 Mylne & Craig, 613.
(*d*) 1 Dougl. 188.
(*e*) 2 B. & Ald. 570.
(*f*) 12 East, 40.
(*g*) 7 B. & C. 236; *S. C.* 1 Mann. & Ryl. 20.

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fund for purely public purposes. It was not intended by the case to raise any nice distinctions as to the relative extents of the borough and of the corporation, but merely to determine the former question. Now *The Attorney-General* v. *Aspinall* (*a*) clearly shews that they are trustees. Lord *Cottenham*, C. said, "I cannot doubt that a clear trust was created by this act, *for public purposes*, of all the property belonging to the corporation." In order to shew that the corporation property is rateable, a distinction has been sought to be drawn between "rent" and "profits;" but the intention of the clause was to direct all the payments due to the corporation to be paid over to the treasurer, so as to form one fund. Then it is said, that as part of the fund is to be appropriated to salaries, that is a private purpose. But it is clear that in all the cases where trustees of public funds have been held to be exempted from rate there must have been salaried officers. Stript of these distinctions, it is submitted that the specified objects to which the borough fund is to be applied are all public purposes. The case of *Rex* v. *The Trustees of the River Weaver Navigation* (*b*) is very much in point: there the surplus of the tolls was to be expended on the bridges and highways of the county of Chester. That was not strictly for the benefit of the public at large, but only for the inhabitants of Cheshire; yet it was held to be a public purpose. Even supposing then that there is a surplus, that would not make the fund rateable; but that fact does not appear on the case, and it may be that a borough rate may be necessary. What advantage then can there be in rating the borough fund, because by so doing a borough rate may be made necessary, which is only taxing the inhabitants in another shape, with the additional expense of a double system of collection? The case therefore of *Rex* v. *The Beverley Gas Works* (*c*) is quite in point, where the commis-

(*a*) 2 Mylne & Craig, 613.
(*b*) 7 B. & C. 70, n.; 9 D. & R. 788.
(*c*) 6 A. & E. 645; *S. C.* 1 N. & P. 646.

sioners had the power to rate the town, and dispose of any surplus there might be for the general purposes of the act; and the Court held, that to rate them to the poor would cause the commissioners to rate the inhabitants for the mere purpose of paying the poor's rate. As to *Rex* v. *Agar* (*a*) and *Rex* v. *St. Giles, York* (*b*), those were mere eleemosynary establishments, and were therefore properly rated, because, although the funds were disposed of for charitable purposes, they were so disposed of voluntarily; whereas the corporation, as public trustees, are bound to administer the fund as directed by the act. The principle, on which the point of rateability depends in these cases, is this; if the trustees are not the recipients of the ultimate profit arising from the fund, or if the fund is devoted to public purposes, they are not rateable. But when the trustees are the recipients, although they may afterwards apportion it out to the individual freemen of a corporation, as in *Rex* v. *The Mayor of York* (*c*), then, for the sake of convenience, the Court will rate the corporation. Another case of *The Attorney-General* v. *Wilson* (*d*), cited in the note to *The Attorney-General* v. *Aspinall* (*e*), was subsequently decided in affirmance of it.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an appeal against a rate made for the relief of the poor of the parish of Liverpool, upon certain properties which are the revenue of the municipal corporation of the borough of Liverpool, and which, before the passing of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), were rated to the relief of the poor, and as the case states, are still liable to be so, unless they are exempted by the operation of that act.

This question, which now comes before us for the first time, depends upon the construction of the 92d section, and

(*a*) 14 East, 256.
(*b*) 3 B. & Ad. 573.
(*c*) 1 N. & P. 539.
(*d*) 2 Mylne & Craig, 634, n.
(*e*) Ibid. 613.

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the effect to be properly attributed thereto. By that section it is enacted, that "the rents and profits of all hereditaments, and the interest, dividends and annual proceeds of all monies, dues, chattels, and valuable securities, belonging or payable to any body corporate, named in conjunction with the said borough in the said schedules (A. and B.), or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for), shall be paid to the treasurer of such borough, and all the monies which he shall so receive shall be carried by him to the account of a fund, to be called 'The Borough Fund.'"

Such is the description of that which is to constitute the fund; and upon the language of it, and more particularly upon the meaning of the word "profits," much criticism was employed in the course of the argument. We, however, attribute little importance to those remarks; first, because the particular meaning which may have been attached to it, in the instruments to which reference was made, probably depended entirely upon the context; and further, we are perfectly satisfied that the language is used in its ordinary and popular sense, and that the meaning is, that the whole *income* of the corporation, from whatever sources arising, shall constitute "the borough fund."

Then comes the direction as to the uses and purposes for which the fund is to be applied; and it is declared that the same, subject to the payment of the debts owing by the corporation at the time when the act passed, or of so much as the council (i.e. the new council) should think it expedient to redeem, and to the interest of such debt, was to be applied to the payment of the salaries of certain officers, expenses of borough elections, sessions and prosecutions, gaols and corporate buildings, police, and all other expenses incident to carrying the act into effect; and in case of a surplus, that such surplus was to be applied, under the direction of the council, *for the public benefit of the inhabitants and the improvement of the borough.* Then follows a provision, in case of a

deficiency for the purposes aforesaid, that the town council may raise the deficiency by a borough rate in the nature of a county rate. The question therefore comes to this; what is the state of the law as to the rateability of property similarly circumstanced?—because if we find the principle settled by decisions already made, we feel it to be our duty to act upon them, and not, upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority. Now, in the case of *Rex* v. *The Inhabitants of the Parish of Liverpool* (*a*), certain trustees, in whom "the dock estates" within the same parish were vested, were rated in respect of "the annual value and profits" of the same; and property (*otherwise rateable*) was there held not to be so, because the rates and duties payable by act of parliament were to be applied to the payment of debts, and to the "making, erecting, building, finishing and maintaining docks, basins, piers, and other works and buildings in the port of Liverpool." In that case therefore the application of the tolls or rates (which otherwise, as we have just observed, must have been as much rateable as a mileage rate upon a canal), in the manner above described, exempted them from rateability. And in the case of *Rex* v. *The Trustees of the River Weaver Navigation* (*b*), which was under the consideration of the Court at the same time as the case just cited, property (as in that case clearly rateable) was held to be exempt, on account of the uses and purposes to which the profits were applicable. There the rates and duties, after payment of expenses, &c. were directed to be "employed in the repair of bridges and in aid of other public charges upon the county." And the Court decided that the principle of the former disposed also of the latter case. They held that the repairing and maintaining of bridges and highways were *public purposes*, and that as no part of the monies received could be applied to *private purposes*, they were therefore not rateable in the hands of the trustees.

(*a*) 7 B. & C. 61; *S. C.* 9 D. & R. 780.
(*b*) 7 B. & C. 70, n.; *S. C.* 9 D. & R. 788.

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We feel it to be impossible substantially to distinguish these cases, and especially the latter, from the present. The extent and approximation to something like national benefit, are in kind, and almost in degree, the same. The *public* in the one case is the same town of Liverpool; in the other, the county of Chester.

The case of *The Attorney-General* v. *Aspinall* (*a*), in which this very borough fund was under consideration, was cited by the learned counsel on both sides. The main question, however, seems there to have been, whether the corporate property was *trust* property, so as to come under the jurisdiction of the Court of Chancery: and it is probable (though it is wholly unnecessary to express any opinion) the same decision might have been given if the property had been comparatively of a much more *private* nature. But we have the satisfaction of observing that the view which we have taken of the earlier part of the 92d section, is expressly adopted by the Lord-Chancellor; for his lordship, in describing (not giving the words of) that section, comprehends "the rents, profits," and other sources of revenue therein enumerated, by the general expression of "all the *income* of the corporate property."

In coming to the conclusion to which we have arrived, we certainly feel that whatever may be the effect in the present instance, in many boroughs, consisting of several parishes, the proportion and rate of contribution may be materially disturbed. We think it also extremely probable that the effect of this section upon the rateability of corporate property was overlooked altogether. Our business, however, is with the construction of the statute, and not with consequences; and the remedy, if any be requisite, must be by the legislature.

The result of our opinion is, that the order of sessions must be quashed.

Order of Sessions quashed as far as relates to the rate upon the corporation.

(*a*) 2 Mylne & Craig, 613.

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Friday, January 11th.

The QUEEN *v.* The Chamberlains, Common Council, and Freemen of the Borough of ALNWICK.

Where freemen and the widows of deceased freemen of a municipal corporation enjoyed the right of depasturing an uninclosed moor, of digging turves, clay, sand and marl, of cutting whins and furzes, of getting limestones and slates from the quarries, and sowing grass seeds on the moor, according to regulations framed by the corporation, and the corporation had inclosed a part of the common 100 years back, which they still retained in severalty; but it appeared that the rights of the freemen originated in grants of right of common and turbary, and that there was no evidence to shew that any larger right had ever been granted to them, and that a rent of 2*s.* per annum, which had been reserved on the grant of the right of turbary, was still paid to the lord of the manor:—Held, that the freemen only possessed a right of common, though with large and unusual enjoyments, and that therefore it was an incorporeal tenement not rateable to the poor.

ON an appeal against a rate for the relief of the poor of the parish of Alnwick, the Northumberland quarter sessions confirmed the rate, subject to the opinion of this Court upon a case in substance as follows:

The town of Alnwick is an ancient borough, and the freemen are a body corporate by prescription, by the name of "The Chamberlains, Common Council, and Freemen of Alnwick." The common council consists of twenty-four freemen elected for life, from whom four chamberlains are annually chosen. The management of the affairs of the corporation is vested in the chamberlains and common council. Adjacent to the town of Alnwick is a large tract of uninclosed ground, called Haydon Forest or Alnwick Moor, upon which the freemen of Alnwick, and widows of deceased freemen resident within the parish of Alnwick, have from time immemorial been entitled to certain rights or privileges. It was, as the alleged occupiers of the said moor, that the appellants were assessed as below:

		Valued at			Monthly Rate.		
The Chamberlains, Common Council, and Freemen of the Borough of Alnwick,	For Land,	£.	*s.*	*d.*	£.	*s.*	*d.*
		350	0	0	8	18	0

The appellants objected to the rate, on the grounds that they did not occupy any land in the parish of Alnwick legally liable to be rated. That if it was intended to rate the appellants in respect of common of pasture, the property was not properly described in the rate. That such common of pasture was not rateable, and, even if rateable *per se*, was not in the beneficial occupation of the appellants, so as to render them liable to be rated. The most ancient docu-

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ments in the possession of the corporation relating to the borough, are three charters from the *De Vescis*, formerly lords of the manor of Alnwick; the first of which, supposed to be of the reign of *Henry* 2, stated, that the grantor, *William de Vesci*, "granted and confirmed to the men, my burgesses of Alnwick, to hold of me and my heirs &c., to them &c., as freely as the burgesses of Newcastle hold of the lord the King of England, and also to have common of pasture in Haydon, and in the moor of Haydon." The second charter, by the grandson of the above *William*, confirmed the said common of pasture; and the third charter, by his son in 1290, also confirmed to the burgesses of Alnwick all their liberties &c., "with common in Haydon, and with all the privileges in Haydon Moor, in the marshes, feeding and pasture grounds, with liberty to get peat, turves, and brush wood, as well in the forbidden month as in others; and the burgesses, for the privileges which they are to have in Haydon in the forbidden month, with their liberties, shall give me and my heirs 2*s.* annually."

About 1700 the corporation inclosed about 700 acres from Alnwick Moor, which are divided into several farms. On March 6th, 1762, by articles of agreement between *Hugh* Earl of *Northumberland* and *Elizabeth*, wife of the said earl, of the one part, and the then chamberlains and twenty-four common councilmen, on behalf of themselves and the rest of the freemen, of the other part; after reciting a bill filed in the Court of Chancery by Lord and Lady *Northumberland* against the corporation of Alnwick, praying that the rights of the plaintiffs in Alnwick Moor might be settled and declared, and that the corporation might be prevented from demising or inclosing any more of the said moor; in order to put an end to all differences, it was mutually agreed (inter alia) that Lord and Lady *Northumberland* were lord and lady of the manor of Alnwick, and that Alnwick Moor was parcel of the manor: That the freemen of Alnwick were entitled to common of pasture upon Alnwick Moor, upon payment of the rent of 2*s.* per annum for the liberty of depasturing their cattle thereon in the fence

month, and that the freemen of Alnwick have a right to dig as well as cut peats, furzes, turves, and bushes growing thereon, for their own use; and that the lord and lady of the said manor have no right to grant the herbage or vesture of the said moor to their tenants holding by burgage tenure, or any other person whatsoever. That the present inclosures (being part of the moor) should be established to the corporation, but that no new inclosures should be made, and that the soil and royalties of Alnwick manor should be vested in the said earl and countess. That the freemen and freemen's widows should have liberty to get limestones, slates, and freestone, in any of the present quarries, and to dig clay and burn bricks in such parts of the said moor as the lord's bailiff and the chamberlains should think fit, for the use of themselves or the use of any other freeman; and in like manner to dig and take away sand, gravel, clay and marl for their own use.

By an indenture, dated 30th July, 1811, between the Duke of *Northumberland* and the chamberlains and common council in behalf of the other freemen, reciting that the freemen of Alnwick were entitled to common of pasture and other rights upon Haydon Moor, the duke granted a right of common, on two pieces of freehold land, to the freemen of Alnwick, in exchange of their right of common and other rights on a certain portion of Haydon.

The Duke of *Northumberland* is lord of the soil and royalties of the said moor, granting licence to make bricks, get clay, and of making washpools, winning stones, coals and limestones. About three years ago, the duke, as lord of the manor, granted to the corporation his licence in writing, for a permanent washpool of stone-work upon the said moor.

By a lease of the present duke to the corporation, dated 29th July, 1833, (after reciting the articles of 1762,) he, as the impropriator of the tithes of the manor, demised to them for ten years, at the rent of 1*s*., the agistment tithes payable in respect of cattle depastured on the inclosed lands of the corporation, and also in respect of the cattle of

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the freemen depasturing the said moor, on which the freemen were stated in the lease to be entitled to common of pasture.

The rent of 2*s.* per annum, reserved for the liberty of depasturing the said moor in the fence month, is regularly paid to the Duke of *Northumberland.* The inclosures made from the moor previously to 1762, are let to tenants, and the rents paid to and applied by the common council for the benefit of the corporation.

The freemen do not ask any permission to turn their cattle on the moor; they know the regulations, and put on their cattle accordingly, without making any payment whatsoever to the corporation for the exercise of their right.

No cattle belonging to the corporation are turned upon the moor, nor is there any occupation thereof by the chamberlain and twenty-four councillors, except by their own cattle, as individual freemen.

No profit whatever arises to the corporation, in their corporate capacity, from the moor. The chamberlains and common council exercise the power of making by-laws, regulating the number of stints to be depastured by the freemen, and by the by-laws the moor-grieves are authorized to distrain all cattle depasturing the moor contrary to the by-laws, and the number of stints is regulated by the herd.

The chamberlains and common council appoint both the moor-grieves and the herd; the latter of whom, in addition to his salary paid by the corporation, has four stints on the moor, his right to put on which was established in a replevin suit at the assizes.

The corporation have frequently employed persons in hoeing up and burning the whins and furzes growing upon the uninclosed part of the moor, and in draining the same for the improvement of the herbage, and in sowing grass seeds where the whins and furzes have been removed.

Upon the foregoing evidence the sessions were of opinion that the corporation were in such occupation of the herbage

of the said moor, as trustees for the freemen, and for their benefit; and the questions for the opinion of the Court are,

1st. Whether there is any rateable occupation of Alnwick Moor, in respect of the aforesaid rights and privileges enjoyed by the freemen?

2d. Whether the occupation of the same is properly described in the rate as aforesaid?

3d. Whether, if there is such a rateable occupation, the rate is properly made upon the appellants?

Should this Court be of opinion, on these questions, in the affirmative, the order of sessions to be confirmed, otherwise to be quashed.

The case was argued at the Sittings in Banc after last Michaelmas term (*a*).

Talfourd Serjt., *R. Ingham* and *Otter*, in support of the order of sessions. The question is, whether the corporation did not possess something more than a right of common on this moor; for if they had any territorial possession, then they are rateable. Rights of common are defined by Serjeant *Williams*, in his note to *Potter* v. *Williams* (*b*), and he shews that commoners have no right to meddle with the soil, or to cut the bushes, fern, or other things growing on the common, or to improve or cultivate the common. But the corporation here has clearly much more extensive rights, such as digging for clay, cutting whins, and even sowing them, which are all *indicia* of beneficial occupation. In *Jones* v. *Richard* (*c*), where the only act of ownership shewn on a common was that of exclusive pasturage, the Court thought that sufficient evidence for the jury to infer ownership. The question is not as to the respective titles of the Duke of *Northumberland* and the corporation, for if the party be in the actual occupation, the Court will not inquire into the legal title; *Rex* v. *Bell* (*d*). It

(*a*) December 2, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*b*) 1 Wms. Saund. 353, n. (2).

(*c*) 5 A. & E. 413. See the same case on the second trial, 1 N. & P. 747.

(*d*) 7 T. R. 598.

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is immaterial, therefore, whether the rights of the corporation have been gained by usurpation, or whether they have the whole right to the soil. *Burt* v. *Moore* (*a*) and *Dyson* v. *Collick* (*b*) shew that the possession of the corporation would have enabled them to maintain trespass, even although their possession is in some respect merely by the permission of the lord; and it is found they actually have maintained actions of replevin. *Rex* v. *Churchill* (*c*) will be relied on by the other side, but there the burgesses had the mere right of turning cattle into certain fields for a portion of the year; they had nothing, therefore, but a limited right of common, which has been always held not rateable. II. The second point is concluded by the finding of the sessions, for occupation of the herbage, is occupation of the land; even if their finding is wrong in point of law, it is conclusive; *Rex* v. *Ilminster* (*d*), *Rex* v. *Ellis* (*e*). III. As the rights enjoyed by the freemen in this case consist of *profits à prendre*, which can only exist by prescription or grant, and, as freemen, having no succession, cannot take under a prescription or grant, it is clear that the rights must be vested in the corporation, and therefore they are the parties to be rated. *Rex* v. *The Mayor and Commonalty of York* (*f*) is the last case on this point, and it shews that, under circumstances like the present, the corporation is properly rated, and that the decisions in *Rex* v. *Sudbury* (*g*) and *Rex* v. *Tewkesbury* (*h*), are to be followed, rather than *Rex* v. *Watson* (*i*).

Sir *F. Pollock*, *Wightman* and *Grainger*, contrà. The simple question here is, whether this be any thing more than an incorporeal tenement. If it is not, it clearly cannot be rateable. It is not denied that, when certain acts of ownership are proved, the right of property may be pro-

(*a*) 5 T. R. 329.
(*b*) 5 B. & Ald. 600; *S. C.* 1 D. & R. 225.
(*c*) 4 B. & C. 750; *S. C.* 6 D. & R. 635.
(*d*) 1 East, 83.
(*e*) 1 M. & S. 652.
(*f*) 1 N. & P. 539.
(*g*) 1 B. & C. 389; *S. C.* 2 D. & R. 651.
(*h*) 13 East, 155.
(*i*) 5 East, 480.

perly left to the jury, as in *Jones* v. *Richard* (*a*), but where the sessions have found the facts specially, it is for the purpose of the Court drawing a conclusion. [Lord *Denman* C. J. We must take it that the sessions desire our opinion.] Then, as it is expressly found that this is a right of common, how can it be made rateable? No doubt, where a party is exercising all the acts of beneficial ownership, he is rateable, whether with or without title, as in *Rex* v. *Bell* (*b*), and in a case decided in this Court, where a Gas Light Company had obtained a licence from the crown to lay down pipes in St. James's Park, which was revocable at pleasure. But where the possession is of a mere incorporeal tenement, then *Rex* v. *Churchill* (*c*) shews that it is not rateable; and, if it be more than an incorporeal tenement, then, according to *Rex* v. *Aberavon* (*d*) and *Rex* v. *Watson* (*e*), the individual freemen who occupied the moor ought to be rated, and not the corporation.

When the corporation are seised of the soil in fee, and take payments from the commoners, then no doubt they are rateable, as in *Rex* v. *Tewkesbury* (*f*), *Rex* v. *Mayor, &c. of York* (*g*), and the other cases cited. The argument on the other side has too much limited the rights of commoners, for *Clarkson* v. *Woodhouse* (*h*) shews that a custom for the commoners to inclose part of the common in severalty for the purpose of cutting turves is good.

Then it is said, that this is a *profit à prendre*, and therefore that it must be vested in the corporation; but, as this is the case of a common in gross, the prescription may be held to exist in every individual freeman and his ancestors, as appears by *Mellor* v. *Spateman* (*i*).

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was an appeal by the chamber-

(*a*) 5 A. & E. 413.
(*b*) 7 T. R. 598.
(*c*) 4 B. & C. 750; *S. C.* 6 D. & R. 635.
(*d*) 5 East, 453.
(*e*) 5 East, 480.
(*f*) 13 East, 155.
(*g*) 1 N. & P. 539.
(*h*) 5 T. R. 412, n.
(*i*) 1 Saund. 346.

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lains, common council, and freemen of the borough of Alnwick, against a rate for the relief of the poor of the parish of Alnwick, whereby the appellants were assessed as occupiers of land valued at 350*l.* The Court of Quarter Sessions for the county of Northumberland confirmed the said rate, subject to the opinion of this Court upon a case which states the facts hereinafter noticed, and at the conclusion, "that the sessions were of opinion that the corporation were in the occupation of the herbage of 'Alnwick Moor,' as trustees for the said freemen, and for their benefit, so as to render them liable to be assessed to the said rate." We notice this at the outset, because, generally speaking, this finding of the sessions would have been conclusive upon the question. In this instance, however, from the long statement of facts submitted to our consideration, it is impossible not to perceive that the finding of the sessions was merely formal, and that their real object was to procure our opinion—whether the facts stated warrant their conclusion or not.

The principal question accordingly (and into which alone it is necessary for us to enter) is, whether the interest of the appellants in the district (of from 2000 to 3000 acres) called Aydon or Haydon Forest, or Alnwick Moor, in the neighbourhood of the town of Alnwick, be of such a nature as to make them liable to be rated. It is material to observe thus early, that it is found as a fact that the Duke of *Northumberland* is *lord of the soil and royalties of the said moor;* and if that finding needed any confirmation, it would have received it from the fact of his having recently granted a written licence to erect a permanent washpool thereon. It is obvious, also, that the original grants to the burgesses of Alnwick were plainly of a right of common, and of that right only. Hence this important consideration arises—that the burthen is clearly cast upon those, who contend that some larger interest in the soil than a mere right of common is vested in the appellants, to shew how and when such enlarged interest accrued.

The two first grants are from the family of *De Vesci,*

then lords of the manor of Alnwick, and supposed to be about the dates of *Henry* 2 and *Edward* 1 respectively, "of common of pasture" in Haydon, in the manor of Haydon, to their burgesses of Alnwick. The third grant to the said burgesses, of the date of 1290, by the son of the second grantor, is of certain lands (not material to the present purpose) "with common in Haydon, and with all the privileges in Haydon Moor, in the marshes, feeding and pasture grounds, with liberty to cut peats, turves and brushwood, and with all other their free appurtenances and privileges which they were wont to have and use in the times of my ancestors, as well in the forbidden month, as in others;" for which enlarged privilege, during the fence month, 2*s*. annually were to be paid, and the same (as the case states) is regularly paid to the lord at this day.

From the two earlier grants, therefore, common of pasture only, and by the third, common of turbary in addition, with an extension of all the privileges over the fence month, were given to the burgesses. And the payment of the 2*s*. annually, as already mentioned, amounts to a distinct acknowledgment of the force and validity of the said grant of 1290, by which, unquestionably, no right in the soil, of a higher nature than that of common of pasture and turbary, passed to the burgesses.

Nor do we think that, from the more modern deeds and instruments introduced into the case, any inference of a contrary tendency can be fairly deduced. That of 1811 was for the purpose of effecting an exchange between the Duke of *Northumberland* and the chamberlains, common council and freemen of Alnwick, "of a certain portion of inclosed land belonging to the duke, adjoining to Aydon Forest or Alnwick Moor, for a certain portion of the said forest or moor:" and it is to be observed, that what is thereby professed to be relinquished to his grace, is not *land*, but "*all the right of common and depasturage*, and other right, title, claim and interest of the said chamberlains, &c., of, in, and to the piece of ground in question."

The last in order, and the most recent in date, is the deed

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of 1833, whereby the duke, as impropriator of the tithes of the manor and borough of Alnwick, for a rent of 2*s.* leased, during a term of ten years, the agistment tithe payable in respect of cattle depastured (amongst other places) upon the said moor, on which the freemen of Alnwick are therein stated *to be entitled to common of pasture.*

We have purposely omitted the articles of agreement of March 1762, though of earlier date than the two deeds lastly noticed, because they have reference especially to the inclosure of upwards of 700 acres of the moor, about the year 1700,—a fact to which considerable importance seems to have been attached, though, with the accompanying explanation, it appears rather to operate in favour of the appellants. That such inclosure was made upon any exercise or claim of right, is certainly not shewn;—that it originated in encroachment and usurpation, there is every reason to conclude.

The said articles of agreement made between the Earl and Countess of *Northumberland* and the chamberlains &c. of Alnwick, after reciting that a bill had been filed by the said earl and countess against the said chamberlains (amongst other things), to establish the right of the former to the soil and inheritance in the place in question, and to restrain the latter from letting or inclosing any part of the same, went on to adjust between the parties that the said inclosure of 700 acres should stand, but that no further inclosure should be made; and that the soil and freehold *were to be vested* in the said earl and countess, as from the earlier documents it is quite clear that they were before. Since, therefore, the Duke of *Northumberland* is stated expressly to be lord of the soil, and that there is no reason for concluding that the part of the moor inclosed was under different circumstances from the rest, and the chamberlains &c. formally stipulate to inclose no more, it seems clearly to follow that they had no right to inclose at all; for if they had, why should they renounce it?

It must certainly be conceded (as was pointed out in the

argument) that very large, and with reference to commons generally, unusual rights are by these same articles conceded or admitted to belong to the freemen, such as the liberty to disturb the surface, by digging for clay and gravel, and to cut down whins, wattles, &c., upon the surface; and in other respects also (as appears by the case) they have interfered with it. Seeing, however, as we think we do distinctly, the original relation of these parties to each other, to have been that of lord and commoner, and that there is nothing in any subsequent deed or instrument to satisfy us that the quality and extent of the interest of the freemen has since been varied, we think that the nature of their rights is still, as at first it is shewn to have been, that of commoners, though with large and (as we have before observed) unusual enjoyments upon this moor.

In coming to this conclusion upon the facts of this case, we have in effect disposed of it, because it was not contended in argument (and could not have been with any prospect of success) that, unless the interest of the appellants in this tract of land was something more than an incorporeal hereditament, the rate could be sustained. It is not needful, therefore, to do more than to observe generally, as to all the cases cited in the argument, *Rex* v. *Watson* (*a*), *Rex* v. *Aberavon* (*b*), *Rex* v. *Tewkesbury* (*c*), *Rex* v. *Sudbury* (*d*), and the recent case of *The Mayor and Corporation of York* (*e*), that there was, undoubtedly, *rateable property*, and the only question was, whether there was a *rateable occupation*.

Thinking therefore, as we do, that the first point is in favour of the appellants, we do not enter into the second, and upon that express no opinion.

The result is, that the order of sessions must be quashed.

Order of Sessions quashed.

(*a*) 5 East, 480.
(*b*) 5 East, 453.
(*c*) 13 East, 155.
(*d*) 1 B. & C. 389; *S. C.* 2 D. & R. 651.
(*e*) 1 N. & P. 539.

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FLETCHER *v.* MARILLIER and another.

Friday, January 11th.

To trespass for breaking and entering the plaintiff's house, and taking her goods, on the 2nd March, 1837, the defendants pleaded—As to the breaking and entering &c., and taking the said goods, that one *S.* was tenant of a certain house to the defendant, under a demise at a certain rent, payable, &c.; that on the 25th Dec. 1836, rent was in arrear, and from thence until the time when &c.; that the said goods, on the 25th Feb. 1837, they then being the property and in the possession of *S.*, were fraudulently removed by him from the said demised house, and were then, with the privity and consent of the plaintiff, placed by *S.* in the house of the plaintiff. The plea then justified the entry and seizure under the 11 *Geo.* 2, c. 19, s. 1; and concluded with a verification:—Held, on special demurrer, 1, that the plea should have been confined to a justification of entering the plaintiff's house, and that her property in the goods should have been denied in a separate plea: 2, That if the plea were to be taken to deny that the goods were the plaintiff's, the denial was argumentative; or, if it were to be taken to admit them to be the plaintiff's, that the case was not then brought within 11 *Geo.* 2, c. 19; so that in either view the plea was bad: 3, That the plaintiff's possession of the goods was not admitted either in the introductory words of this plea, or in the averment that they then being the property and in the possession of *S.*, were placed in the plaintiff's house with the privity and consent of the plaintiff.

TRESPASS, for breaking and entering the plaintiff's dwelling-house, and taking her goods there, on the *2nd March*, 1837.

Second plea: As to the breaking and entering &c., and seizing and taking the said goods, that one *John Stent* was tenant of a certain house to the defendant, under a demise from year to year, at a certain rent, payable, &c. That on the 25th December, 1836, rent was in arrear, and from thence until and at the time when &c., that the said goods, before the said time when &c., and after the rent aforesaid became due from *Stent* to the defendant, to wit, on the *25th February*, 1837, they then being the property and in the possession of *Stent*, were fraudulently removed by *Stent* from the said house demised by the defendant, and were then, with the privity and consent of the plaintiff, placed and deposited by *Stent* in the said dwelling-house, in which &c., against the form of the statute. And therefore defendant *Marillier* in his own right, and the other defendant as his bailiff, the said rent being in arrear, and there being no sufficient distress upon the demised premises, within thirty days next after said goods had been so fraudulently removed, entered into the said dwelling-house in which &c. (the outer door thereof being then open), in order to seize the said goods, and did then, and within

thirty days, seize the said goods so there found as a distress for the said arrears of rent, &c. Verification.

Special demurrer; for that the defendants ought to have confined that part of the plea which relates to the fraudulent removal of the goods of the said *Stent* from the said demised house, to a justification of so much of the trespasses mentioned in the declaration as relate to the breaking and entering the said house, and then to have traversed in a separate plea that the goods in the declaration mentioned were the goods of the plaintiff, as in the declaration alleged, and to have concluded to the country; and not to have pleaded such fraudulent removal as a justification of the seizing of the said goods, and then aver that they were the property of *Stent*, and conclude with a verification. Also, for that so much of the plea as relates to the seizing the said goods is argumentative in this, that instead of simply traversing that the said goods were the plaintiff's, it denies the same in a circuitous manner, by the following averment (that is to say), they then being the property and in the possession of *Stent*.

The following was the notice of the point intended to be made in support of the plea:—That it is quite consistent with the averment in the plea, that the goods were the property of *Stent* at the time of the fraudulent removal, that the plaintiff should, in the interval between the fraudulent removal and the seizure, have acquired such a possession and property in the goods as would, primâ facie, entitle him to maintain trespass, and yet that he has not such a title as, by virtue of the 2nd section of 11 *Geo.* 2, c. 19, would protect the goods from the distress; and that, if he had acquired such a title as last mentioned, he should have alleged it in his replication.

Bayley, in support of the demurrer (*a*). The plea is bad on the grounds specially assigned. The justification ought to have been confined to the breaking and entering the

(*a*) Friday, Nov. 30, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

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plaintiff's house, and the defendants should have traversed that the goods seized were the plaintiff's, in a separate plea. The plea is argumentative. Stat. 11 *Geo.* 2, c. 19, s. 1, empowering the landlord to distrain goods fraudulently removed, has been held to apply to those goods only which are the property of the tenant; *Thornton* v. *Adams* (*a*). The plea leaves it as a mere matter of inference that the goods were the property of the tenant on the 2nd March, 1837, because they were so on the 25th February previously. The defendants might have admitted a sale of the goods to the plaintiff for valuable consideration before seizure, under the 2nd section, and then shewn that the plaintiff was privy to the fraud, so that nothing passed. It should either have been admitted that the goods were the plaintiff's, or have been expressly stated that they were the tenant's.

Martin, contrà. The plea, justifying the seizure as well as the entry, is in the common form: 3 *Chit.* Pl. 1137 g (*b*). The form is similar in *Nelson* v. *Cherrell* (*c*) and *Rich* v. *Woolley* (*d*). The plea does not deny that the plaintiff had such a possession of the goods as to enable her to maintain trespass, for it avers that they were deposited in her house, but under such circumstances that her possession was wrongful. [*Patteson* J. It might have been well enough if you had said the goods were in plaintiff's possession; but it is consistent with your plea, that, though they were placed in plaintiff's house with her privity, the defendant kept sentry over them all the time, and never let them out of his own possession.] The plea has admitted the plaintiff's possession by not denying it.

Cur. adv. vult.

Bayley, in reply. If the plea means to admit the plaintiff's property in the goods, the statute does not apply as a defence. As the declaration alleges that the goods were

(*a*) 5 M. & S. 38.
(*b*) 5th ed.
(*c*) 7 Bing. 663.
(*d*) 7 Bing. 651.

the plaintiff's, the plea should have either expressly denied it, or have given color.

Lord DENMAN C. J. now delivered the judgment of the Court:—

The question in this case was, whether the special plea should not have been confined to the breaking and entering the house. We are of opinion that it should have been so confined; and that the addition in the introductory part of the plea, of the "seizing and taking the said goods and chattels," coupled with the justification in the body of the plea, renders it bad. The justification asserts that the goods were the property of one *Stent;* that they had been fraudulently removed by him from a house which he held as tenant to the defendant, in order to avoid a distress for rent in arrear, and that they had been placed in the plaintiff's house with her privity and consent, against the form of the statute; and then goes on to justify the entering the house in order to seize the goods, and the seizing them under the provisions of 11 *Geo.* 2, c. 19, s. 1.

If by this plea it be meant to deny that the goods at the time of the seizure were the goods of the plaintiff, the denial is plainly indirect and argumentative, and the plea is bad for that reason, which is assigned as cause of demurrer. If, on the other hand, the plea be taken to admit the goods to have been, at the time of seizure, the goods of the plaintiff, then the plea is bad, in not bringing the case within the 11 *Geo.* 2. That statute authorizes the landlord to follow goods only which belonged to the tenant at the time of the removal, and not even those, if bonâ fide transferred to an innocent person for value; that is, in effect, goods which at the time of removal were, and at the time of seizure continued to be, the goods of the tenant. It is obviously inconsistent with the right to seize under the statute to admit that at the time of the seizure they were the goods of the plaintiff, not being the tenant.

But it is said that the plea admits only the simple possession of the goods in the plaintiff, and goes on to shew

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that such possession was wrongful, and that the property was in *Stent*, so that the plea is consistent. The answer is, that the plea does not admit the possession of the plaintiff. The introductory words do not; for they are the same words which would be used to introduce a direct traverse of the goods being the goods of the plaintiff, and cannot therefore involve an admission of their being in her possession. The words of justification in the body of the plea do not, for they merely state the goods to have been the property and in the possession of *Stent*, and to have been placed in the plaintiff's house not in her possession, or with her privity. Under these circumstances we need not consider what would have been the effect of a positive averment, that the goods were in the possession of the plaintiff.

The uniform course of pleading under this statute, and also in cases of entering one man's house to seize the goods of another under a fi. fa., has been to confine the plea to the trespasses in regard to the house. The case of *Nelson* v. *Cherrell and others* (*a*), was cited contrà, and there is also a case, *Rich* v. *Wooley and others*, in the same volume (*b*). In the former it may be well doubted whether the pleadings are accurately reported, and in the latter it rather seems as if the plea was so confined. However, in neither case was the point raised.

Judgment for the plaintiff.

(*a*) 7 Bing. 663. (*b*) Ibid. 651.

Friday, January 11th.

A prosecutor is not bound by 5 *Geo.* 2, c. 19, s. 2, to enter into recognizances, in order to get a certiorari to remove an order of sessions for quashing a conviction.

Ex parte SPENCER.

A Certiorari was issued in May, 1838, to remove an order of quarter sessions, whereby the conviction of one *Ranger*, by certain justices of the peace for Wilts, at petty sessions, was quashed; and it was further ordered that the said justices should pay *Ranger* the costs of appeal. The certiorari was issued at the instance of the prosecutor.

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Barstow now moved to quash the writ of certiorari and the allowance thereof for irregularity, no recognizances having been filed pursuant to 5 *Geo.* 2, c. 19, s. 2. It is true that it has often been held that the various restrictions imposed upon parties suing out a certiorari are applicable to defendants only, and the doctrine was very recently acted upon in *Rex* v. *Boultbee* (*a*). That case was decided on the Game Act, 1 & 2 *Will.* 4, c. 32, s. 45. But the words of the statute now relied upon are most comprehensive, and apply to the prosecutor as well as the defendant. The statute, after reciting that writs of certiorari are often used to very bad purpose in removing judgments of sessions, enacts "That no certiorari shall be allowed to remove any such judgment or order, unless the party or parties prosecuting such certiorari, before the allowance thereof, enter into a recognizance, with sufficient sureties, before one or more justices of the peace of the county or place, or before the justices at their general quarter sessions, or general sessions where such judgment or order shall have been given or made, or before any one of his majesty's justices of the said Court of King's Bench, in the sum of 50*l.*, with condition to prosecute the same," &c.

Lord DENMAN C. J.—The practice has been uniform, for a great many years, to apply the statutable regulations for suing out a certiorari to defendants only, and we must not depart from that practice.

LITTLEDALE, WILLIAMS and COLERIDGE, Js. concurred.

Rule refused.

(*a*) 6 N. & M. 28.

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Friday, January 11th.

BABER *v.* HARRIS.

Defendant, who was lessee of certain premises, *granted* and assigned them by indenture to the plaintiff, who, having been distrained upon for rent in arrear to the superior landlord before the assignment, brought assumpsit to recover the money paid under the distress, and relied upon an express promise by defendant to repay it:—Held, that as covenant would lie on the covenant implied in the word "grant," assumpsit would not lie on any implied contract to indemnify the plaintiff, nor on the express promise, which was not founded on a new consideration.

ASSUMPSIT for money lent, money paid, money had and received, and on an account stated. Plea: non assumpsit.

At the trial before Lord *Denman* C. J., at the London sittings after Michaelmas term, 1836, it appeared that the defendant, who was the lessee of certain premises, had assigned them to the plaintiff, and that at the time of the assignment certain rent was in arrear, for which the plaintiff was subsequently distrained upon. The action was brought to recover the amount paid under the distress. A deed of assignment was put in evidence, by which the defendant bargained, sold, *granted*, assigned, transferred, and set over the premises to the plaintiff, and entered into the usual covenant for quiet enjoyment (*a*). Some letters, written after the plaintiff's goods had been distrained, were also produced, which, it was contended, amounted to an express promise on the part of the defendant to repay to the plaintiff the amount of the distress. It was objected that the plaintiff had misconceived his form of action, which should have been covenant, and not assumpsit, and *Schlencker* v. *Moxsy* (*b*) was cited. Verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Stammers, in Hilary term, 1837, having obtained a rule nisi,

Bagley, in Michaelmas term (*c*), shewed cause. It is questionable whether any covenant is contained in the deed of assignment upon which the plaintiff could have sued. At all events it is only an implied covenant. There is an implied contract on the part of the defendant to indemnify the plaintiff against any liability for rent due before the assignment, upon which assumpsit will lie, although there should also

(*a*) This covenant was not mentioned at the bar.

(*b*) 3 B. & C. 789; *S. C.* 5 D. & R. 747.

(*c*) Nov. 19, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

be an implied covenant to the same effect arising out of an instrument under seal. An implied contract may be superinduced when it is not inconsistent with, and is altogether independent of, the original contract. The defendant was guilty of a breach of duty for which case would lie. Case lies against a tenant after the expiration of his term, as well as covenant, for the breach of covenants contained in his lease; *Kinlyside* v. *Thornton* (*a*). In *Burnet* v. *Lynch* (*b*), where the lessee by *deed-poll* assigned his interest, subject to the covenants in the lease, and afterwards brought case against his assignee for non-performance of such covenants, it was contended that the form of action should have been covenant on the implied covenant, or assumpsit on the implied promise entered into by the assignee. The Court there held that case was properly brought, and *Littledale* J. observed, "Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, then although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action." *Hancock* v. *Caffyn* (*c*) is a strong authority for the plaintiff. *Caffyn* having a lease of a house, let one *Nicholles* into possession, by an agreement under seal, in which he covenanted to grant *Nicholles* a lease, when *Nicholles* should have paid, for furniture &c., 1200*l*., which he was to do by instalments in three years, and he covenanted in the meantime to pay *Caffyn* a certain rent. *Nicholles* paid the rent to *Caffyn*, but *Caffyn* did not pay rent to his superior landlord, and it was held that case lay against *Caffyn*, at the suit of the assignees of *Nicholles*, for the damage sustained by him in having been distrained upon by the superior landlord. Case, therefore, might have been brought by the present plaintiff for the defendant's breach of duty, and if so, assumpsit also is maintainable for breach of the contract, implied in the relation established

(*a*) 2 W. Bl. 1111.
(*b*) 5 B. & C. 589; *S. C.* 8 D. & R. 368.
(*c*) 8 Bing. 358.

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between the parties. The letters are evidence of an express promise to pay the amount distrained for, and after verdict the Court will intend that an express promise has been proved; *Sir John Trever* v. *Roberts* (*a*). Assumpsit lies upon an express promise made after the breach of a covenant. Thus it lies for rent upon an express promise, for it appears then that the defendant intended to give a double remedy; *Com. Dig.* Action on the Case upon Assumpsit (C), citing 3 *Lev.* 150. So where plaintiff and defendant covenant by articles of partnership to account and settle the balance, assumpsit lies on an express promise to recover the balance struck; *Foster* v. *Allanson* (*b*), and *Moravia* v. *Levy* in a note to that case. In *Schlencker* v. *Moxsy* (*c*), after the event, guarded against by the deed, had actually happened, there was no express promise to support the action; so also in *Bulstrode* v. *Gilburn* (*d*), the covenant, on which the plaintiff had a remedy, was an express covenant, and there was no subsequent promise to pay, which distinguishes both those cases from the present. No hardship is cast on the defendant by bringing assumpsit, as judgment recovered in this action could be pleaded to a subsequent action of covenant; *Blake*'s case (*e*).

Stammers, contrà. No principle is more clearly established than that a plaintiff cannot bring assumpsit when he has a remedy of a higher nature; 1 *Chitty* on Plead. 103, 6th ed.; 1 *Rolle's Abr.* 11, tit. Action sur Case, pl. 20, and 517, tit. Covenant, pl. 3. That principle is not at all shaken by *Kinlyside* v. *Thornton* (*f*), and *Burnet* v. *Lynch* (*g*), where case was held maintainable, because no action of covenant lay. In *Foster* v. *Allanson* (*b*), and *Moravia* v. *Levy*, an account had been stated between the parties, which formed a new consideration for the express

(*a*) Hard. 366.
(*b*) 2 T. R. 479.
(*c*) 3 B. & C. 789; *S. C.* 5 D. & R. 747.
(*d*) 2 Str. 1027.
(*e*) 6 Rep. 43 b.
(*f*) 2 W. Bl. 1111.
(*g*) 5 B. & C. 589; *S. C.* 8 D. & R. 368.

promise to pay the balance. The covenant in this case was express, and according to *Schlencker* v. *Moxsy* (*a*), the law will not imply any promise in such a case. An express promise makes no difference, unless it be made on a new consideration; *Green* v. *Harrington* (*b*), and *Anonymous* (*c*).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court:—The only question in this case is, whether, under the circumstances, an action of covenant could be maintained upon the indenture of assignment from the defendant to the plaintiff; for if it could, no action of assumpsit upon an implied promise to indemnify will lie. This doctrine is clearly established in many cases, amongst others, in *Bulstrode* v. *Gilburn* (*d*), *Toussaint* v. *Martinnant* (*e*), and *Schlencker* v. *Moxsy* (*a*). An express promise to pay, if proved, which it was not, could make no difference, at all events without a new consideration such as forbearance, and nothing of that kind was attempted to be shewn.

Now it is said that this indenture does not contain any express covenant to indemnify against the rent due to the superior landlord, nor for quiet enjoyment. But if the plaintiff be disturbed in his possession, which he is when distrained upon for rent, an action of covenant will lie upon the word "grant," in the indenture of assignment, which brings this case directly within the authorities above alluded to. This rule for a nonsuit must therefore be made absolute.

Rule absolute.

(*a*) 3 B. & C. 789; *S. C.* 5 D. & R. 747.
(*b*) Hutton, 34.
(*c*) Cowp. 128.
(*d*) 2 Str. 1027.
(*e*) 2 T. R. 100.

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Friday, January 11th.

In case against a broker, for negligently delivering goods without payment, the plaintiffs called their servant, whose duty it was to deliver under the orders of the defendant, and who had delivered without such orders:—Held, that he was an interested witness, and therefore was not competent to prove that the defendant was informed of such delivery in time to stop the goods and prevent loss to the plaintiffs, and that he neglected to do so.

BOORMAN and others *v.* BROWNE.

CASE. The declaration stated that the plaintiffs, who were seed-crushers, had employed the defendant, a broker, to sell and deliver certain quantities of oil for ready money; that oil had been consigned to the defendant, to be delivered to one *Peacock* on the above terms; and that through the negligence of the defendant the same was delivered to other persons, carrying on trade under the firm of *Hare* & Co., without payment of the price, &c.

Pleas: 1, not guilty: 2, that the oil was not consigned to the defendant: and 3, that he was not employed by the plaintiffs.

On the trial before Lord *Denman* C. J., at the London sittings after Hilary term, 1837, it appeared that the plaintiffs, who were seed-crushers, had employed the defendant to sell and deliver a quantity of oil, consigned to him at London by the Barham; that he contracted for the sale of it to *Peacock*, and that it was his duty not to deliver it without payment. For the plaintiffs, a witness was called of the name of *Easton*. He stated on the voire dire that he was lighterman and ledgerman in the employment of the plaintiffs; and that it was his duty to attend to the delivery of oil for the plaintiffs, under the orders of the broker; and it appeared from the statement of the plaintiff's case, that the loss of the oil in question arose from the witness having transhipped it to a vessel called the Success, without the defendant's orders. The competency of this witness was then objected to, on the ground that if he transhipped the oil without the authority of the defendant, he would himself be answerable to the plaintiffs for breach of duty. His lordship admitted the witness, who stated that, on the arrival of a vessel, called the Barham, with the oil, he, at the request of *Peacock*'s clerk, transhipped it to the Success, bound for Bristol; that he informed the defendant on the following day of what had occurred; that the defendant —

had time to have stopped the oil; that he said, "Do not stop it; I will see the parties." It was also proved that the oil had been received by Messrs. *Hare*, at Bristol, and that the plaintiff had not been paid. The question left to the jury was, whether the oil had, through the negligence of the defendant, been delivered without payment. Verdict for the plaintiffs.

Sir *J. Campbell* A. G. in the following Easter term having obtained a rule nisi for a new trial, on the ground that the witness was incompetent,

Cresswell and *Cleasby*, in Michaelmas term last, shewed cause (*a*). The witness was competent for the plaintiffs. His interest in the event of the suit, in order to disqualify him, should have been direct and certain: 1 *Stark.* Ev. 2d ed. 103. Suppose plaintiffs failed in the action in consequence of its not appearing that the defendant had, as charged in the declaration, caused the delivery of the oil before payment;—how would the witness have been prejudiced by such a result? The verdict for the defendant could certainly not be made evidence against him in any future action brought by the plaintiffs, so that there could have been no indorsement on the record, under 3 & 4 *Will.* 4, c. 42, s. 26. If interested at all, he was interested for the defendant. If the defendant had a verdict against him in consequence of the misconduct of the witness, the witness would have been liable over to him, and would have to pay the damages and costs of the present action. But the more correct view of the witness's situation is, that he had no interest at all either way; because it was no part of his duty to withhold delivery until payment. That duty devolved on the defendant alone. And this circumstance distinguishes the present from those cases in which the same duty has attached to the witness and to the party against whom his evidence is tendered; so that, either the one or

(*a*) November 21, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

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the other having been guilty of the particular breach of duty, the effect of such evidence would be to shift the responsibility from the witness to such other party. Here the duties of the witness and defendant were different; the defendant was to give a delivery order on payment, and the witness to deliver under the directions of the defendant. In the cases which will be relied upon for the plaintiffs, the event of the cause depended on the question of the witness's misconduct: 1 *Stark.* Ev. 2d ed. 112. Here the witness's conduct was not itself any part of this inquiry. The question was not whether the defendant *or* the witness had done wrong; they might both have done a wrong, for which they would be separately liable; the witness in making the inchoate delivery, and the defendant in adopting it. In *Green* v. *The New River Company* (*a*), a servant of the defendants was held incompetent to negative a charge of negligence, on which the action was founded: but there evidence had been given by the plaintiff that the conduct of that particular servant occasioned the injury complained of. In that case, undoubtedly, the witness was interested in obtaining a verdict for the defendants, as a verdict against them would have been evidence for them, and against him, if they subsequently sued him. Now, if the plaintiffs failed in this action, how could they possibly use a verdict in favour of the defendant as evidence against the witness in a subsequent action against him? It is to be observed that in all those cases in which, before the 3 & 4 *Will.* 4, c. 42, a witness was held incompetent on account of a verdict in the action being evidence against him, his testimony was offered by the defendant. And in such a case the witness is called to rebut a primâ facie case already made out against his master, whereas, if he is called for the plaintiffs, neither he nor his master may have been impeached by the evidence. In *Morish* v. *Foote* (*b*), which was case for driving a mail-coach against the plaintiff's horse and waggon, the plaintiff's waggoner was certainly called for the plaintiff, and

(*a*) 4 T. R. 589. (*b*) 8 Taunt. 454.

held incompetent. But that case cannot be supported; and even if it be good law, it does not apply, for in that, as in most other cases of the kind which may be cited, the onus of negligence was thrown, in the alternative, either upon the witness, or upon the driver of the other vehicle. Accordingly, in *Cuthbert* v. *Gostling* (*a*), which was trespass for breaking through the wall of the plaintiff's house, with pleas of not guilty and a licence, to which there was a new assignment of excess, the defence set up was, that the trespasses complained of were committed in repairing the defendant's own house, and that having obtained the plaintiff's leave to do what was necessary in repairing it, he had done no more than was necessary; and to establish this defence, he was allowed to avail himself of the testimony of the workmen employed in doing the work. And Lord *Ellenborough* there said, "The case was quite different from an action for the negligence of servants in driving against carriages or running down ships; for there, if the master be liable to the plaintiff, the servants are necessarily liable to the master; and they have a direct interest to defeat the action." The position of *Easton* then was this: he was not interested in the verdict as an instrument of evidence; if the plaintiffs failed in this action, it would appear to have been improperly brought; and therefore if they then sued *Easton*, the verdict in this cause could not be evidence against *Easton* for the purpose of proving the amount of costs, or for any other purpose; and, if the plaintiffs succeeded, the verdict could not be afterwards used by the defendant against the witness, as it turned entirely upon a question with which the witness was not implicated, namely, whether, after the transhipment by *Easton*, the defendant had not neglected to retrieve the oil. Nor was *Easton* interested in the question itself in the cause, for the result of this action, which was brought for a breach of duty by the defendant, could not have affected the liabilities of the witness for breach of a wholly different duty.

(*a*) 3 Campb. 515.

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Sir *J. Campbell* A. G. and *Butt*, contrà. The witness was interested for the plaintiffs, for he was employed by them, and not by the defendant; and, after having acknowledged in the earlier part of his testimony that he had been guilty of a breach of duty in delivering without orders from the defendant, he clearly redeemed himself by saying that the defendant might have withdrawn the oil delivered, and that the injury was occasioned by his neglecting to do so. The competency of the witness must be determined with reference to the way in which the question as to the defendant's liability actually arose at the trial. Thus, in an action on a policy of insurance on goods from London to Embden, where the ship was lost by putting into the Texel, the captain, who was part owner of the ship, was admitted to prove that she originally sailed, on the voyage insured, by direction of the owners of the goods; but it was held that, if the question had turned on a deviation, he could not have been examined to prove that the deviation was justified by necessity: *De Symonds* v. *De La Cour* (*a*). So in this case, as the question turned on this—whether the defendant had taken on himself the *admitted laches* of the witness, the witness was incompetent. The distinction which has been taken between the competency of plaintiffs' witnesses and defendants', in questions of this kind, was urged in *Morish* v. *Foote* (*b*); and *Burrough* J. there observed, "A distinction has been taken between witnesses for a plaintiff and witnesses for a defendant; but it would introduce an extreme anomaly in the law if it made any difference in cases of this nature, whether the witness was called on one side or on the other." There are many similar cases: *Miller* v. *Falconer* (*c*), *Wake* v. *Lock* (*d*), *Kerrison* v. *Coatsworth* (*e*), and *Sherman* v. *Barnes* (*f*). By a verdict for the plaintiffs, the witness would be placed in a state of security, as the judgment against the defendant would be a discharge,

(*a*) 2 New Rep. 374.
(*b*) 8 Taunt. 454.
(*c*) 1 Campb. 251.
(*d*) 5 C. & P. 454.
(*e*) 1 C. & P. 645.
(*f*) 1 Mood. & R. 69.

which witness might plead in bar to any action brought against him by the plaintiffs; whereas, if the defendant obtained a verdict, the plaintiffs might make witness liable.

Martin v. *Henrickson* (*a*), *Lay* v. *Holock* (*b*), and *Shilty* v. *Bowens* (*c*), were also cited. [*Cresswell* mentioned *Yeomans* v. *Legh* (*d*).]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action against the defendant, a broker, for negligently delivering a certain quantity of oil, of the plaintiffs, without payment; the declaration stating that the same had been consigned to the defendant to be delivered to one *Peacock upon payment*, and that the defendant delivered to *Hare* without such payment.

Upon the trial before me at Guildhall, at the sittings after Hilary term, 1837, *Thomas Easton* was called as a witness for the plaintiffs; and the object of so calling him was to prove that the delivery of the oil had been directed by himself, under the orders of the defendant. The witness described himself as being a lighterman and ledgerman; that he had been employed by the plaintiffs about five years, and that the nature of his employment was to attend the brokers for their orders, and to hand them over to the captains. It subsequently appeared that the witness earned 50*l.* or 60*l.* a year from the plaintiffs by this employment. To the competency of this witness objection was made, upon the ground that he was directly interested in the event of the suit, and in fixing the liability upon the defendant. And the question seems to be reduced to this single point: whether the witness, by the share which he came to avow himself to have had in the transaction, *did* render himself liable to the plaintiff; because if he did, it seems impossible to distinguish, favourably for the plaintiffs, at least, the pre-

(*a*) 2 Ld. Raym. 1007.
(*b*) 1 Peake, N. P. C. 101.
(*c*) 1 Peake, N. P. C. 53.
(*d*) 2 M. & W. 419; and see *Bowman* v. *Willis*, 3 Bing. N. C. 669.

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sent from those cases on which reliance was chiefly placed in support of the objection, and to which we shall presently advert.

Now certainly the oil, whilst it remained on board the Barham, by which vessel it was consigned (according to the plaintiffs' case) to the defendant's care, was in a state of security. The mischief and loss arose from its being transhipped to another vessel, which conveyed it away to Bristol, by which the damage was alleged to have been sustained. And if that act had been done by the witness without any authority from the plaintiffs, and injury was thereby incurred, he (the witness) surely would have been responsible. Such liability therefore having attached upon the witness, according to the earlier part of his testimony, it comes next to be considered whether his position can be distinguished from that of a servant, called for the plaintiff, his master, in an action brought by the latter for some alleged negligence in the defendant, whereby the plaintiff's carriage or vessel (whatever the case may be) sustained damage; and we cannot see how the interest of this witness can be *less* to shift his own primâ facie liability upon the defendant, by proving orders given by the latter to him to do the thing, than that of the servant (in the cases alluded to) to clear himself of all responsibility to his master, by showing his own conduct in the transaction to have been wholly blameless, and the fault or negligence to have been wholly on the side of the defendant, or those representing him, when the mischief took place. The responsibility in the present case seems to be quite as probable and imminent as in those: and in those cases we consider the rule now to be too well settled to admit of doubt or question. Thus, in the case of *Miller* v. *Falconer* (*a*), which was an action against the defendant for negligently running against plaintiff's cart with a dray, the servant of the latter, who was driving the cart, was held to be incompetent by Lord *Ellenborough* without a release. The like is reported by

(*a*) 1 Campb. 251.

Gibbs C.J., in the case of *Morish* v. *Foote* (*a*), to have been ruled by Lord *Kenyon* as to a ship-owner, where, in an action on a policy on goods on board that ship, he was called to prove her sea-worthy, the defence being that she was not. Reported also in *Peake*'s C. 117, by the name of *Rotheroe* v. *Elton*. And in the case just mentioned, of *Morish* v. *Foote* (*a*), a case precisely the same in its circumstances again occurred; and the Court of Common Pleas, upon full argument, held the plaintiff's servant incompetent without a release.

It has been urged that there is a marked distinction, in actions of this description, between the case of a plaintiff and a defendant: that in the latter instance the servant is necessarily called to *rebut* the charge of negligence, which is to render him liable to his employer, for that, unless *some* case had been made against the defendant, his (the servant's) testimony would not be required; whereas, in the former, it stands at least indifferent whether any suggestion of negligence will be made against the servant or not; and indeed in the *then* state of things, when the objection is made, the presumption is rather the other way. Whether, if this had been res integra, this distinction might have been considered of any importance, it is unnecessary now to inquire, for it was pressed upon the notice of the Court of Common Pleas in the case (already referred to) of *Morish* v. *Foote* (*a*), without affecting the conclusion at which they arrived.

Being of opinion therefore that the law is settled by those cases, and that the objection of interest in the present instance is, *at least*, as strong, (and we need not go further,) we think that the witness was incompetent, and that there must be a new trial.

Rule absolute.

(*a*) 8 Taunt. 454.

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REEVES and another *v.* M'GREGOR and another.

Friday, January 11th.

An action at law, and a suit in equity by the defendants in that action, for an injunction to restrain the plaintiffs from proceeding in it, were referred to an arbitrator, the costs of the action and of the suit *to abide the event of the award.* There were several issues in the action; as to some of them he found for the defendants, and as to so much of the suit as regarded them, against the defendants, on the ground that they had a defence at law. As to the other issues he found for the plaintiffs with 5*l.* damages, but as to so much of the suit as regarded them he awarded that the plaintiffs should not proceed to recover the damages nor costs.—Held, that the arbitrator had not exercised such a discretion over the costs as the reference meant to exclude, but that he had merely exercised a power over them necessarily resulting from the reference, and without which he could not properly have adjudicated upon the suit in equity.

THIS action, and a suit in equity, by the present defendants against the present plaintiffs, praying for an injunction to restrain the plaintiffs from proceeding in this action, had been referred to an arbitrator, the costs of the action and of the suit in equity *to abide the event of the award;* the costs of the reference and of the award to be in the discretion of the arbitrator. There were six issues in the action; as to three of which the arbitrator found for the defendants, and as to so much of the suit in equity as regarded them, against the defendants, on the ground of want of equity, they having a legal defence. As to the other three issues, he found for the plaintiffs, with 5*l.* damages; but as to so much of the suit in equity as regarded them, awarded that the plaintiffs should be restrained, and should not proceed to recover the damages found for them, nor costs, and that the costs of the suit and action should be borne by the respective parties by whom they had been incurred.

Petersdorff, in Michaelmas term, 1837, obtained a rule nisi for setting aside the award, so far as related to the plaintiffs not proceeding to recover the costs of the issues found for the plaintiffs, the damages upon those issues, and the general costs of the cause, and also the costs of the suit in equity, on the ground that the arbitrator had in those respects exceeded the power conferred on him by the submission, and that the same were inconsistent with it and with the other facts of the arbitrator's award.

Cresswell and *Addison*, in Michaelmas term 1838, shewed cause (*a*). It is objected to this award that, although by

(*a*) Nov. 12, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

the order of reference the costs of the action and suit were to abide the event of the award, and although the event of the action has terminated in favour of the plaintiffs, yet the arbitrator has deprived them of the costs of the action, and has therefore exceeded his authority. And if his power had been confined to the action at law, the event would undoubtedly have entitled them to the costs; but he had also the equity suit to dispose of, and he has done no more than a Court of Equity, for which he was substituted, might have done, in restraining the plaintiffs from proceeding to recover damages and costs on the issues found for them. Coupling then the event of the action and of the suit together, can it be said that there is any event which entitles the plaintiffs to costs? The award would have been bad if the suit had not been disposed of, and the award cannot be objected to on the ground that it restrains the plaintiffs from taking out execution in the action.

Platt and *Petersdorff*, contrà. The arbitrator had no discretion over any costs except those of the reference, and the argument on the other side is, that he might indirectly exercise the very power which was denied him. The event of the award does not mean the entire event, but means the event distributively of the action and of the suit respectively. Where costs are to abide the event of an action the arbitrator has no power to order a stet processus, which, in effect, he has ordered here. A Court of Equity would not interfere in an action in which the plaintiffs have recovered substantial damages.

Cur. adv. vult.

Lord DENMAN C. J. now delivered judgment, and, after stating the case, proceeded thus:—We are of opinion that the arbitrator has not exceeded his authority. The event of the award, which the costs were to abide, means the ultimate and general event, not each particular part; and as the suit in equity, which was referred, prayed an injunc-

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tion, the arbitrator clearly had power to order that the plaintiffs should be restrained, on equitable grounds, from proceeding to recover all that which, on legal grounds, they were entitled to. It is true that he thus indirectly exercises a jurisdiction over the costs at law, but that is the exercise of a power necessarily resulting from the nature of the reference, and without which he could not have properly adjudicated upon the suit in equity; it is by no means the exercise of a discretion as to the costs, such as the reference meant to exclude, and the costs are still left to abide the event, as the parties intended. The rule must therefore be discharged, but without costs.

Rule discharged.

WOLLEN *v.* SMITH.
HORNCASTLE *v.* SMITH.
PRICE *v.* MORGAN.

Saturday, January 12th.

The defendant, after pleading his bankruptcy and certificate *puis darrein continuance*, cannot force the plaintiff to reply, and the latter may discontinue the action, without payment of costs.

E. JAMES, in Michaelmas term, 1837, had obtained a rule calling upon the plaintiffs to shew cause why the summons taken out in *Wollen* v. *Smith*, dated the 1st day of April last past, should not be discharged, and why the defendant should not be at liberty forthwith to sign judgment for want of a replication.

By the affidavits on which the rule was obtained it appeared that the defendant had been arrested by the plaintiff on a bill of exchange for 38*l.* 13*s.* on the 11th November, 1836. The plaintiff declared on the 11th February, 1837, and the defendant pleaded, on the 14th February following, that he did not accept the bill. On the 15th July, 1835, a fiat of bankruptcy issued against the defendant, and on the 18th March, 1837, he duly obtained his certificate, and by a judge's order, on the 22d March, 1837, pleaded his certificate *puis darrein continuance* to the action. On the 23d March the defendant ruled the plaintiff to reply. On the 1st April the defendant was summoned

before a learned judge to shew cause why the action should not be discontinued, each party paying his own costs. The attorney for the plaintiff then stated that he had had no opportunity of proving the plaintiff's debt under the commission, and that therefore he was entitled to prove and discontinue without costs. The learned judge adjourned the consideration of the question until an opportunity had been afforded of learning whether the plaintiff could have proved the debt, or not. It was then sworn that the plaintiff could have proved his debt under the fiat, but that he proceeded with the action without doing so, until the defendant pleaded his certificate. In Trinity term, 1837, the defendant obtained a rule calling upon the plaintiff to shew cause why the defendant should not be at liberty to sign judgment of non-pros; but the rule was discharged on a technical ground.

In Michaelmas term, 1837, *E. James* obtained the above rule nisi;

Humfrey shewed cause against the rule in Michaelmas term last (*a*). The plaintiff is clearly entitled to discontinue this action after the plea *puis darrein continuance*, without being liable to costs; *Baker* v. *Morrey* (*b*), *Lyttleton* v. *Cross* (*c*). If the present rule is made absolute, the plaintiff will have to pay the costs of the action, although it appears upon the face of the record that he had a good right of action, and is only defeated by matter subsequent. *Thompson* v. *Percival* (*d*), which will probably be relied upon, is not applicable; for the question does not arise here whether the requisites of the Bankrupt Act have been complied with.

E. James, contrà. The latter part of the rule in this case is very important as regards actions brought against bankrupts. The plaintiff allows the time to go by for

(*a*) Nov. 8th, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge*, Js.

(*b*) 1 Moo. & P. 138.

(*c*) 4 B. & C. 117; *S. C.* 6 D. & R. 81.

(*d*) 5 B. & Ad. 925.

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proving his debt under the defendant's commission, and then arrests the defendant. If then the defendant pleads his certificate *puis darrein continuance*, he is entitled to have his costs as on any other plea in bar which would be found for him. *Harris* v. *James* (*a*) is a direct authority on this point. *Thompson* v. *Percival* (*b*), and *Augarde* v. *Thompson* (*c*), shew that, unless the plaintiff comply with the requisites of the 6 *Geo.* 4, c. 16, s. 59, by proving his debt under the commission, he cannot discontinue the action he has chosen to bring, without payment of costs. [*Patteson* J. Can you shew any instance in which, after a plea of *puis darrein continuance*, the plaintiff has been compelled to go on? The question is quite independent of that section in the Bankrupt Act, which merely enacts that the plaintiff shall not have two remedies at the same time, but contains no provision to prevent the plaintiff from discontinuing without payment of costs.] *Harris* v. *James* (*a*) shews that where issue is joined on this plea and found for the defendant he is entitled to his costs. So in *Thompson* v. *Percival* (*b*), where a stet processus was applied for, by which the same result would be obtained as in discontinuing the action, Lord *Denman* C. J. held that there was no authority for acceding to the application. It would entirely defeat the policy of the bankrupt laws if a party were allowed to arrest a bankrupt and take the chance of obtaining his whole debt under the pressure of an arrest, and yet not run any risk in paying costs, if the defendant plead his certificate *puis darrein continuance*. The Bankrupt Act, s. 59, holds out a premium to a party who has brought an action to discontinue it, without payment of costs; but if the plaintiff does not choose to avail himself of that section and afterwards discontinues, he cannot do so without payment of costs.

Cur. adv. vult.

PRICE v. MORGAN.

In *Price* v. *Morgan* a fiat of bankruptcy issued against the defendant on the 21st April, 1837. A declaration

(*a*) 9 East, 82. (*b*) 5 B. & Ad. 925. (*c*) 2 M. & W. 617.

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in the cause was delivered on the 26th October following, and on the 1st November the defendant obtained his certificate, which he pleaded, on the 25th November, *puis darrein continuance*, and there was no other plea. On the 10th April, 1838, the plaintiff was ruled to reply, and on the 23d gave notice that he abandoned the action, and intended to prove under the defendant's commission. He then obtained an order of *Williams* J. for staying proceedings. A summons was then taken out to rescind this order, and was heard and adjourned by *Williams* J. It afterwards came on before *Coleridge* J., and was rescinded on the authority of *Augarde* v. *Thompson* (*a*). On the 30th June the plaintiff entered a nolle prosequi, on which the master taxed the defendant his full costs. On the 25th October the plaintiff was served with notice that, unless costs were paid within four days, judgment of non-pros would be signed. He then took out a summons to stay all further proceedings, and obtained an order for that purpose until the fifth day of Michaelmas term last.

Gray, in that term, having obtained a rule nisi, on behalf of the plaintiff, for stay of proceedings without costs,

E. V. Williams shewed cause on a subsequent day in the same term (*b*). In addition to the authorities cited in the former case, he cited *Williams* v. *Sharwood* (*c*), to shew that this rule could not be supported, as the master's taxation on the nolle prosequi had not been reviewed.

Gray was heard in support of the rule, and relied on the authorities cited in the former case.

Cur. adv. vult.

Lord DENMAN C.J. now delivered judgment. (After stating the facts of the case in *Wollen* v. *Smith*, his lordship continued thus:)—On the part of the defendant the

(*a*) 2 M. & W. 617.

(*b*) Nov. 26, before Lord *Denman* C.J., *Patteson*, *Williams* and *Coleridge* Js.

(*c*) 3 Bing. N. C. 331.

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case was said to be similar to those of *Thompson* v. *Percival*(*a*), and *Augarde* v. *Thompson* (*b*), in which it was held that a plaintiff cannot avail himself of the 59th section of the 6 *Geo.* 4, c. 16, so as to discontinue without costs, unless he has proved under the fiat, or at least procured a claim to be entered. The case of *Harris* v. *James* (*c*) was also referred to, in which a defendant who obtained his certificate after declaration, but before plea, was held to be entitled to plead it in bar, and to have the costs of the action as he could on any other successful plea in bar. On the part of the plaintiff it was urged that this case differs entirely from those cited, inasmuch as it arises upon a plea *puis darrein continuance*, and is wholly independent of section 59 of 6 *Geo.* 4, c. 16; that every plea *puis darrein continuance* confesses that the action is rightly brought and maintained up to the time of that plea; for the form of the plea is, that the plaintiff ought not *further* to maintain his action; that the plaintiff is in no case compellable to go on with his action after such a plea, but may admit the truth of the defence which has arisen, and abandon his action, without being liable to costs. In support of this position the case of *Baker* v. *Morrey* (*d*) was cited, in which the Court of Common Pleas stayed the proceedings on a judgment of non-pros, signed under similar circumstances to the present, without costs. *Lyttleton* v. *Cross* (*e*) was also referred to for the same general doctrine, and *Lindo* v. *Simpson* (*f*) might have been added. We are of opinion that these cases fully support the plaintiff's argument, and without at all impeaching the authority of *Thompson* v. *Percival*(*a*) and *Augarde* v. *Thompson* (*b*), in both which cases the motions were professedly grounded on section 59 of 6 *Geo.* 4, c. 16; and the only question was, whether the requisites of that section had been complied with; we hold that, after pleading *puis darrein continuance*, the defendant cannot

(*a*) 5 B. & Ad. 925.
(*b*) 2 M. & W. 617.
(*c*) 9 East, 82.
(*d*) 1 Moo. & P. 138.
(*e*) 4 B. & C. 117; *S.C.* 6 D. & R. 81.
(*f*) 2 Smith, 659.

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force the plaintiff on, but the latter is entitled to discontinue his action, without costs.

The present rule must therefore be discharged, but without costs, and the plaintiff has liberty to discontinue, without costs.

The same rule must be pronounced in the case of *Horncastle* v. *Smith* (*a*); and in the case of *Price* v. *Morgan*, in which the same point arose in a different form, the rule must be made absolute.

Rule discharged.

(*a*) This was another action against the defendant, which raised the same point.

PALMER *v.* TEMPLE.

Saturday, January 12th.

INDEBITATUS assumpsit for 300*l.* money had and received, for interest, and on an account stated. Pleas:—1, non-assumpsit. 2. That the plaintiff had impleaded the defendant on the 2d July, 1835, in an action on promises for 1000*l.* money had and received, and such proceedings were thereupon had &c. that it was considered by the Court that the plaintiff should take nothing by his suit, &c. Averment, that the sum of 300*l.* in the first count mentioned was part of the sum of 1000*l.* in the declaration in the former suit, and that the supposed causes of action in both suits were identical. Verification.

Replication that, although the defendant did implead the plaintiff &c., and the defendant obtained judgment &c. defendant de injuriâ absque residuo causæ, &c. The

By an agreement for the purchase of a public-house, 300*l.* was paid by the purchaser, (*by way of deposit and in part* of the purchase money.) The purchase was to be completed on a certain day, and it was agreed that if either party should refuse to perform the agreement, he should pay the other 1000*l.* liquidated damages:—Held, that on this agreement it was not intended that the 300*l.* should be forfeited on the failure of the purchaser to complete the contract.

On the day for completing the purchase, the purchaser threw up the contract, on the ground that the vendor was not ready to complete, and sued him in special assumpsit for the 1000*l.* liquidated damages, and for 300*l.* money had and received. The jury found a verdict for the defendant, the vendor, on the ground that he was ready to complete the contract. After the writ was sued out against the vendor, he disposed of the public-house to another party, and the purchaser again sued him for 300*l.* money had and received:—Held, that as the former action failed, on the sole ground that it was prematurely brought, the judgment in it was no bar, and that as the parties did not intend the 300*l.* to be forfeited as a deposit, the purchaser was entitled to recover it back.

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particulars of demand stated the action to be brought to recover 300*l.*, being money had and received by the defendant for the plaintiff, on the 15th June, 1835. At the trial before *Williams* J. at the sittings after Hilary term, 1837, in Middlesex, it appeared that the action was brought to recover the sum of 300*l.*, which had been paid by the defendant to the plaintiff as a deposit under a memorandum of agreement made between the parties on the 15th June, 1835, which was in substance as follows :—

" The said *Chas. Temple*, in consideration of the sum of 300*l.* to him now paid by the said *Wm. Palmer*, as the said *C. Temple* doth hereby acknowledge (by way of deposit and in part of the sum of 5500*l.*, the consideration agreed between the parties to be given by the said *Wm. Palmer* for the purchase of the messuages and tenements hereinafter mentioned, &c. for the trade, &c.) agrees that he and all (if any) other necessary parties will, on or before the 24th day of June instant, demise unto the said *Wm. Palmer*, his executors, &c. all that messuage, tenement, or public house, called the Somers' Town Coffee House, with the yard, outbuildings, and appurtenances thereto belonging, for the term of forty-seven years and a half; and for the consideration aforesaid the said *Wm. Palmer* agrees to pay to the said *Chas. Temple* the sum of 5200*l.*, the residue of the purchase-money, on the execution of the said lease to him and the delivery of the spirit licenses duly assigned, and possession of the said public house and premises." It was also further agreed, that if either party should refuse to perform the agreement, he should pay to the other 1000*l.* as liquidated damages.

By a memorandum indorsed on the instrument, it was agreed that if " there was in existence any agreement for a lease of the premises in *Clark's* occupation, (which formed part of the outbuildings,) Mr. *Palmer* is to ratify such agreement;" and by a further memorandum it was agreed to extend the time for completing the contract to the 29th June. On the 29th June the parties met, attended by their respective solicitors, brokers, and wine and

spirit gaugers, to make a valuation and complete the agreement. This occupied the greater part of the day, and at about five o'clock in the afternoon the plaintiff's gauger went away, stating that he would return to complete the business, but he never did. The valuation was completed at ten o'clock, and at about a quarter before twelve o'clock at night the plaintiff's solicitor tendered the purchase-money, and demanded possession to be given of the whole of the premises, including certain cottages which were let to weekly tenants. Complaint was made that this demand was made too late, as it was impossible to give possession at that late hour of the night, but it was promised that possession should be given early in the morning. The plaintiff upon this refused to complete the contract, and on 2d July following issued a writ to recover the deposit money. The record in the first action contained special counts for breach of the agreement by the defendant, and also a count for money had and received. The defendant pleaded non assumpsit, and that he was ready and willing to perform the agreement, but that the plaintiff was not ready and willing; issue thereon. The particulars of demand stated the action to be brought to recover 1000*l.* as liquidated damages for the breach of the agreement, and also 300*l.* for the recovery of the deposit money. On the trial of that action before Lord *Denman* C. J. the above facts appeared, and his lordship stated to the jury that, as it appeared the plaintiff was aware of the cottages being occupied by weekly tenants, his postponing the demand of possession till the last moment might be looked upon as a waiver, and that it appeared to be a device on the part of the plaintiff to obtain a rescision of the contract. The verdict passed for the defendant. After the issuing of the writ in that action the defendant, in the month of July, 1835, entered into negotiations with a Mr. *Brown* to lease to him the Somers' Town Coffee House and premises, under which *Brown* was let into possession on 21st July, 1835.

On these facts it was contended that the defendant was entitled to a verdict, and the learned judge directed the jury

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to find a verdict for the defendant, giving leave to the plaintiff to move to enter it for himself.

Thesiger having obtained a rule accordingly,

Sir *J. Campbell* A. G., *Kelly*, and Sir *W. W. Follett* shewed cause in Michaelmas term last (*a*). It is difficult to see on what grounds it can be contended that the plaintiff has got a fresh cause of action since the last suit. His former action sought to recover damages for the breach of the agreement by the defendant, and also to recover back his deposit money: the jury found that he, and not the defendant, had broken the agreement, and that he was not entitled to recover the deposit money. The former judgment therefore has completely barred the plaintiff. It is also a question whether a party, who has broken his agreement to purchase, can recover his deposit money? It is submitted that he cannot: *Spratt* v. *Jeffery* (*b*). What has happened since the last action to enable him to recover? It is true that the defendant has granted a lease whilst the other action was pending; but that is immaterial, for the contract was no longer open, and the plaintiff having been the party to break the contract, could not call for a specific performance. There is nothing more common than for a vendor, where the purchaser has failed to complete his contract, to put up the estate again, and claim the difference from the first purchaser. [*Coleridge* J. Suppose the contract contains no stipulation for a forfeiture of the deposit,—could the vendor retain the deposit, and sue for damages too?] He would certainly have a right to sue for damages; and if the jury took the stipulation into their consideration at all, it could only be in reduction of damages. [*Patteson* J. In that case the jury might think the deposit larger than the damages the plaintiff was entitled to recover.] Even in this view, as the defendant would clearly have been entitled to nominal damages if he had sued the plaintiff, he is entitled

(*a*) Nov. 20th, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*b*) 10 B. & C. 249; *S. C.* 5 Mann. & R. 183.

to retain the deposit as a security. The meaning of a deposit is, that it is a security to the purchaser that the contract shall be performed, by binding the vendor, and also a security to the vendor that the purchaser shall complete the contract; and on his failing to do so, it is forfeited, without any further stipulation. No case can be found in which a deposit has been recovered, except where the contract has been rescinded by mutual consent, or where the vendor has failed to complete the contract before the day of performance. [*Patteson* J. Surely that is not so; for in the case of the warranty of a horse, when the price is paid, money had and received will lie if the warranty is broken; yet there the contract is rescinded after the day.] That must be on the ground of the contract being open till it be seen whether the warranty is complied with. But a party who sells an estate is not bound to retain the estate a day after the time fixed for completing the contract, and, if on that day the purchaser refuses to complete, the vendor's action accrues immediately. In this view, the question depends on whether time is the essence of the contract. [Lord *Denman* C. J. That must be conceded.] Clearly; 1 *Sugd.* V. & P. 419 (9th ed.); and that being so, the plaintiff could not have claimed specific performance, and therefore cannot recover the deposit back: *Spratt* v. *Jeffery* (*a*). [Lord *Denman* C. J. I think we must take it that in that case the contract contained a stipulation for the forfeiture of the deposit money.] No trace of it appears in the report, and the whole contract is set out. On what ground is the plaintiff entitled to recover back this money? He must put it on the ground that he has paid money on a consideration that has failed. But from what cause has it failed? Through his own default; for the finding of the jury in the first action shews that the defendant was ready to complete, and that the plaintiff was not. If then the plaintiff was not able to recover back his deposit money at that time, because there was no failure of consideration, on what ground can he be entitled to recover it back now, if time is the essence of the

(*a*) 10 B. & C. 249; *S.C.* 5 Mann. & R. 188.

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contract? Suppose that a shilling had been paid as earnest on a sale of goods under the Statute of Frauds, and that afterwards the purchaser refused to accept the goods,—could that shilling be recovered back? Certainly not; for the vendor, on action brought, would aver his readiness to deliver the goods. Why then should a deposit be recovered back any more than earnest money? No distinction is to be found in the books between contracts with and without a clause for forfeiture of the deposit. Then, with regard to the defendant having granted the lease since; it is clear that he was entitled to do so, as the plaintiff could neither compel specific performance nor maintain an action against him. Suppose *H.* charters a ship for 100*l.*, and pays 10*l.* deposit, and engages that she shall be loaded with a cargo on a certain day, and, when the shipowner arrives at the port, the charterer is not there,—is the shipowner bound to remain there for ever? What right then can the charterer have to receive back the 10*l.*? Suppose, again, a master engaged a servant for seven years for 100*l.*, and paid him 10*l.* deposit, and then refused to receive him,—it is clear that he could not recover back the deposit; but is the servant bound to remain out of service for seven years? In *Clark* v. *Upton* (*a*), where the deposit was sought to be recovered from the vendor, on the ground that he had not made out a good title, the vendor was held entitled to retain the deposit; it is admitted, however, that this was on account of a special contract between the parties. But in *Horford* v. *Wilson* (*b*), where the purchaser was unable to complete the contract, the retention of the deposit money by the vendor was treated as a matter of course. There is a class of cases beginning with *Gray* v. *Gutteridge* (*c*), down to *Duncan* v. *Cafe* (*d*), which decide that, where a deposit is paid to the auctioneer, he is the agent for both parties, and is bound to pay it over to the party to whom it belongs. But this deposit money was paid by the plaintiff in his own wrong, for he had the power of getting the benefit of it, by

(*a*) 3 Mann. & R. 89.
(*b*) 1 Taunt. 12.
(*c*) 1 Mann. & R. 614.
(*d*) 2 M. & W. 244.

completing the contract, and therefore cannot now recover it back.

Thesiger and *Ogle*, contrà. It appears by the agreement that the 300*l.* was not paid as a deposit only, but as part of the purchase money. It is not correct to say that the jury found, on the first trial, that the plaintiff had broken the agreement: the issue was, whether the defendant had; and the jury found that he had not. Therefore the result of the action was, that the plaintiff was not entitled to recover damages for the breach of the agreement. It is true that in some sense time is the essence of these contracts, but not altogether; for it is conceded that the defendant might have filed a bill for specific performance, or brought an action against the plaintiff. But suppose he had brought a cross action,—on what ground could he retain the deposit too? for it is clear he would be entitled to only nominal damages. It is urged that the defendant was not bound to retain the property till the question in the first action was settled; but the answer is, if the defendant thought it more for his benefit to deal with the estate, and dispose of it, he was bound to return the deposit, reserving to himself his right of action. The proposition contended for is that, when the vendor of an estate has put it out of his power to complete the contract, he is bound to return the deposit. It is admitted that *Spratt* v. *Jeffery* (*a*) was an answer to the former action, the jury having found that the defendant was willing to complete the contract; but as soon as the estate was parted with a new case arose. The cases put as analogous are all distinguishable. Where goods are sold, and an earnest is paid, and the goods remain in the possession of the vendor, if the vendor disposes of the goods, and obtains more money for them, it is true that the purchaser may not recover the deposit, because in that case the purchaser becomes the owner of the goods, and the vendor owner of the money, but he may maintain an

(*a*) 10 B. & C. 249; *S.C.* 5 Mann. & R. 188.

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action for money had and received. Then it is asked, if a party engages to serve for seven years, and a deposit is paid him, and then the master refuses to receive him, whether the master could recover back the deposit? It is clear that the servant would be entitled to maintain his action in that case immediately for prospective damages. [Lord *Denman* C. J. Suppose in that case the master had paid half a year's wages in advance, and then refused to receive the servant,—could he recover the money back? I do not think he could.] The main question in this case is, whether this money was paid as deposit or as part of the purchase money. It is submitted to be the latter; and the absence of any clause of forfeiture confirms this view. The next question is, whether the plea of judgment recovered is a bar. [Lord *Denman* C.J. I think you need not consider that point.]

Cur. adv. vult.

Lord DENMAN C. J. delivered the judgment of the Court.—This motion for a rule to enter a verdict for the plaintiff, according to leave reserved by my brother *Williams* at nisi prius, led to a discussion of the most general nature, i. e. whether one contracting for the purchase of landed property, who refuses to complete his contract, may recover the deposit from the vendor, on his afterwards selling the property to another. The plaintiff contended that though the defendant might have sued for a specific performance, or for damages sustained for breach of the contract, he lost the right to detain the money deposited by disabling himself from fulfilling his own part of the bargain. The defendant's argument was, that the money was originally received by him to his own use, not the plaintiff's, and was meant to be forfeited if the plaintiff should fly from his contract: money so deposited, though not to be called earnest, in strictness of speech, being in fact for this purpose in the nature of earnest; that the vendor could not be expected to keep his property always unsold, and might possibly be a loser to a greater extent than the amount of the deposit.

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No authority bearing directly on the question was quoted, either from reports or text book. But Sir *E. Sugden*'s work on the Law of Vendors and Purchasers (*a*) refers to a case of *Savile* v. *Savile* (*b*), where Lord *Macclesfield* held, in conformity to a then recent decision, that a purchaser had a right to abandon his contract on forfeiting his deposit, and no more. It was not questioned that the deposit must be forfeited. Probably, however, a clause to that effect may have formed a part of the contract; in which case the decision would prove nothing as to the nature of a deposit, taken by itself. This is so reasonable and so prevailing a practice, that it is highly probable the general question may never come to be decided; for we do not feel it open to us on the present occasion. The ground on which we rest this opinion is, that, in the absence of any specific promise, the question, whether the deposit is forfeited, depends on the intent of the parties, to be collected from the whole instrument; but as this imposes on either party that should make default a penalty of 1000*l*., the intent of the parties is clear that there should be no other remedy. This fact was mentioned when the rule nisi was obtained by Mr. *Thesiger* for the plaintiff, in the course of the argument. The consequence appears to be, that this vendor may sue for the penalty, and recover such damages as a jury may award; but he cannot retain the deposit, for that must be considered, not as an earnest to be forfeited, but as part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser.

There was a second plea,—judgment recovered; and in fact plaintiff had sued defendant for this very deposit, and the verdict had passed against him. But the evidence shewed the ground of that verdict to be, that the action was prematurely brought, viz. before the contract was

(*a*) 1 Vend. & P. 71, 9th ed. (*b*) 1 P. Wms. 745.

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rescinded, and before defendant had disabled himself from completing it. The former judgment forms no obstacle to the recovery, now that that event has taken place.

It is like an action brought for the price of goods before the credit had expired, which would not prevent a recovery for the same goods after that period.

The rule therefore for setting aside the verdict for defendant, and entering one for the plaintiff with 300*l.* damages, must be made absolute.

But as the defendant may have his cross action against the plaintiff on the clause in the agreement before cited, the reasonable course would be to refer to arbitration the question whether the damages should be reduced, and to what amount, or whether the defendant is entitled to recover more than 300*l.* for breach of his contract, giving the arbitrator power to award accordingly. But, at any rate, this verdict must finally stand for some damages, as the deposit was held by defendant for plaintiff's use, as soon as the fulfilment of the contract became impossible by the defendant's act.

Rule absolute.

Saturday, January 12th.

Where the lessor of the plaintiff obtained a verdict in ejectment in 1834, and taxed his costs, and sued out a writ of possession, which was set aside in 1837, for irregularity, with costs:—Held, that, not having revived the judgment by sci. fa., he could not set off his costs on the judgment against the defendant's costs, on setting aside the writ of possession.

Semble, the defendant's costs on setting aside the writ, although after final judgment, are interlocutory costs within Reg. Gen. H. T. 2 *Will.* 4.

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THE writ of possession in this case (*a*) having been set aside, by a judge at chambers, with costs, the defendant undertaking not to bring an action, the defendant taxed his costs, and applied for them to the lessor of the plaintiff. *Goulburn* Serjt., in Michaelmas term, 1837, obtained a rule calling upon the defendant to shew cause why the costs taxed upon the rule, amounting to 15*l.* 11*s.*, should not be set off against the sum of 84*l.*, the general costs taxed to

(*a*) See 2 N. & P. 604.

the lessor of the plaintiff upon the judgment obtained by him in this cause.

The affidavits, on which this rule was obtained, stated that the lessor of the plaintiff had obtained a verdict in the ejectment, but that, the writ of possession sued out by him having been set aside for irregularity, with costs, the lessor of the plaintiff had offered to deduct the costs of the rule from the said sum of 84*l.*, believing that he was entitled to set off such interlocutory costs against the costs of the cause.

The affidavits in answer stated that, on the hearing of the rule before the learned judge, when the lessor of the plaintiff prayed that the defendant might be restrained from bringing an action, the defendant consented only on the consideration that the lessor of the plaintiff would pay the costs of the rule. They also stated that the ejectment was tried at the spring assizes, 1834; that the costs were taxed in the November of that year; that the writ of execution sued out in 1834 had not been returned; and that a writ of scire facias had not been issued to revive the judgment.

Waddington now shewed cause. First, it cannot be said that the costs of the rule are interlocutory costs, so as to fall within rule 93, Reg. Gen. Hil. T. 2 *Will.* 4. The plaintiff signed final judgment in 1834; and these are costs upon a rule three years afterwards. 2dly. There are no costs due to the lessor of the plaintiff at present, because he has not revived his judgment by sci. fa. It appears by 2 *Tidd*, 1103, 9th ed. that the reason, why a plaintiff is put to his sci. fa. after a year, is that the presumption is, after lying by so long, that he has released the execution, and therefore the defendant is entitled to have an opportunity of pleading to the sci. fa. that he has been released. It is impossible therefore to ascertain at present what costs the lessor of the plaintiff is entitled to set off. 3dly. The payment of the costs on this rule was the consideration on which the de-

locutory which are not the costs of final judgment: *ell* v. *Harding* (*b*). [Lord *Denman* C. J. We doubt ther the pressure of the case against you is on this p 3. But it is said that there was a bargain as to costs. however, is not so: if it had been, it would have bee pressed in the rule: not being so, it was not a conc precedent: *Doe* v. *Carter* (*c*). The usual practice in ju chambers is, not to give costs. If it was demanded no action should be brought, the learned judge may thought it right that it should be upon the conditic paying the costs of the rule; *Doe* v. *Allsop* (*d*) shews t the matter had been discussed, the lessor of the pl would have been allowed to set off his costs. 2. Wi gard to the sci. fa., there may have been many matte keep the judgment alive, as appears by 2 *Tidd*, 1103, 9 and it is every day's practice to plead a judgment as off, although it may be more than a year old. [Lord *man* C. J. The difficulty we have is to see how any at all are due to you under the circumstances. *Coleri* If we made this rule absolute at this moment, could acted upon?] Perhaps not; but the same may be s all pleas of a judgment recovered, of more than a standing. The costs on the judgment are a subs debt, for which an action might be brought. [*Waddi* cited *Mortimer* v. *Pigot* (*e*).]

as the judgment has expired. Possibly if a scire facias had issued, it might have been an answer to the defendant's demand.

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LITTLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

In the matter of Arbitration between BROWN and The CROYDON CANAL Company.

Saturday, January 12th.

SIR *W. W. FOLLETT*, in Michaelmas term, 1837, had obtained a rule, calling upon *Samuel Brown* to shew cause why the award made between the above parties should not be set aside on the following grounds: 1st. That the award was not final, inasmuch as it determined only as to the amount of debt due from the Company to the said *S. Brown* at the time of making the award, and omitted to notice the other matters in difference: 2d. That it was void for uncertainty: 3d. That the award left it in doubt whether the arbitrators had taken into account the Company's set-off: 4thly. That the award did not determine all the matters in difference.

It appeared by the affidavits on which the rule was obtained, that by an agreement made the 16th February, 1830, between *Brown* and the Croydon Canal Company, *Brown* agreed to erect for the Company a patent gas vacuum engine, for sustaining the water of the canal at a certain level, and to keep it in repair for them for fourteen years, and the Company were to pay him for the engine 500*l.*, the expenses

1. Where parties by mutual bonds submitted all matters in difference to arbitration, and the award, after reciting the submission, awarded (without stating it to be of and concerning the premises) that a certain sum was *due and owing* from one party to the other:—Held, that the award must be intended to be made on all the matters referred.

2. It also appeared by affidavit that the claims of one of the parties consisted of items for money due, and also for prospective damages, in consequence of a contract between the parties being put an end to by the other side, but as it also appeared that each of the claims was investigated before the arbitrators:—Held, that a general finding was sufficient that a balance was due to one of the parties.

3. Where on a reference one of the parties admits the claim of the other, but seeks to reduce the balance by a set-off, it is sufficient for the award to state that a sum is owing to one side or the other, without further noticing the set-off.

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of erecting the engine-house, and 100*l.* per annum for the ensuing fourteen years, for the expenses of working the engine. Differences having arisen between the parties as to the right of *Brown* to certain sums claimed by him as due from the Company under the agreement, and also for certain sums claimed as compensation in consequence of the Company having put an end to the agreement; and also as to certain sums which the Company claimed as a set-off; the parties entered into mutual bonds of submission, on the 27th May, 1837, of all the said disputes, and all manner of actions, suits and demands whatsoever, to the arbitration of certain lay arbitrators therein named.

The claim of *Brown* amounted to 3004*l.*, and comprised the following among other items:

	£.	s.	d.
Five years' payment for working the engine	500	0	0
Eight years, for the unexpired term of ditto	800	0	0
Loss of profit from sale of coke &c., which might have been made during the said term of eight years . . .	680	0	0
Loss of opportunities of exhibiting the engine, and of trying experiments with it (*a*)	500	0	0

It was then stated that each of the items in this claim was disputed before the arbitrators, and that the Company disputed their liability to pay more than the sum of 200*l.* to *Brown*, from which they claimed to deduct, by way of set-off, the sums of 38*l.* for money paid, and 30*l.* for loss arising out of a breach of the agreement on the part of *Brown*. The arbitrators, after reciting that certain disputes between the parties, as well as all actions, causes of action, suits, controversies, trespasses, damages, and demands whatsoever, both at law and in equity, or otherwise howsoever, which at any time or times theretofore had been made &c., had been referred to them, and having taken upon themselves the burthen &c., and having fully heard and considered all the evidence produced by the parties, and having investigated all the accounts touching the matters in difference, awarded

(*a*) Power to do this was reserved to *Brown* by the agreement.

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"that there is justly due and owing from the said Company to the said *S. Brown*, the sum of 515*l.* 16*s.* 7*d.*, and we do order and award the said Company to pay the said sum of 515*l.* 16*s.* 7*d.* to the said *S. Brown*."

The affidavits in answer stated, that each of the items contained in *Brown*'s claim was matter of discussion before the arbitrators; that, as to the sum of 38*l.* claimed by the Company as a set-off, the sum was allowed by *Brown*; that the further claim of 30*l.* was a matter of discussion before the arbitrators; and that the avowed object of the parties on each side was to ascertain the final balance to be paid by the Company.

Kelly and *Petersdorff*, now shewed cause. It is difficult to see on what ground the present award is objected to. It is true that there were several distinct items discussed before the arbitrators, but it cannot be contended that the award should find specifically on each item any more than on the items of a disputed account. The final balance was all that the arbitrators had to ascertain, and that was the main object of inquiry before them. If the final balance is ascertained, the award is sufficient; *Platt* v. *Hall* (*a*). It may be said that the arbitrators do not award "of and concerning the premises;" but such strictness is unnecessary, if it appears on the face of the award that the arbitrators have taken all the matters into their consideration; *Gray* v. *Gwennap* (*b*). The test of the goodness of an award is, whether it can be pleaded in bar to an action brought for any of the matters in difference at the time of submission to arbitration. If that test is applied here, it is quite clear that on such a plea evidence could be produced to shew that each matter in difference was gone into before the arbitrators.

Sir *W. W. Follett* and *Fish*, contrà. The objection is not that the award does not profess to be "of and concerning

(*a*) 2 M. & W. 391. (*b*) 1 B. & Ald. 106.

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the premises," which is merely technical, but that the main object of reference, viz. the settling of all disputes, has failed. Mr. *Brown* had claims not only for a debt due but for contingent damages, and the award only disposes of the debt. It was intended that the contract between the parties should be put an end to, but it is not. Suppose an action on the agreement by *Brown* in 1844 for damages in respect of the non-performance of the agreement by the Company, subsequent to the time of making the award, what answer would the award be? [*Littledale* J. The submission is of all matters in difference; if the subject of contingent damages, on the putting an end to the agreement, was not brought before the arbitrators, it was not a matter in difference.] The affidavits state that the claim was raised, but the award does not shew it to be disposed of. *In the matter of Rider and Fisher* (*a*), shews the necessity, where several matters are referred, of awarding on each. The present award would be no answer to an action for after-accruing damages, or at all events it is uncertain, and would require the production of evidence, which is a burden the referring party ought not to have thrown upon him, as the evidence in question may be lost before trial. [Lord *Denman* C. J. It must be always a matter of evidence, whether a certain matter was brought before the arbitrator or not. Perhaps it would be better to send this award back to the arbitrators to ascertain whether they did take the subject of contingent damages into their consideration.] That course cannot be acceded to by the Company. It also appears by the affidavits that the Company had a set-off against *Brown*, and according to a case decided in the Exchequer last term (*b*), an award should dispose expressly of a set-off. It is not disputed that general words are sufficient in an award where they are clearly applicable to all the matters referred, as in *Day* v. *Bonnin* (*c*) and *Dicas* v. *Jay* (*d*); but, if not

(*a*) 3 Bing. New Cas. 874.

(*b*) *Duckworth* v. *Harrison*, 4 M. & W. 432, in that term, is an authority the other way.

(*c*) 3 Bing. New Cas. 219.

(*d*) 5 Bing. 281.

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applicable to all the matters referred, the award is bad; *Gyde* v. *Boucher* (*a*).

Lord DENMAN C. J.—This is substantially an award of all matters in difference. The objection made to it is raised entirely on affidavits, and as it appears therein that all the items in Mr. *Brown*'s claim, some of which were for contingent damages, were brought before the arbitrators, it is contended that by no reasonable intendment can the award be said to dispose of them, as it only finds that a *debt* is due from the Company. It is admitted, however, that a specific finding on each item is not necessary; and although the affidavits on one side state that several distinct claims were brought before the arbitrators, it appears by the affidavits in answer that the general balance in damages was the real object of inquiry by the arbitrators. All the claims therefore seem to have been fused, as it were, into one set of damages, and the result was termed a debt due to the successful party. I do not think such a finding is improper: and as to the evidence which it may render necessary if an action be brought for the same matters, that may often be the case where several matters in difference are referred, and there is no hardship on the Company, for Mr. *Brown* would be bound by his bill of particulars.

LITTLEDALE J.—It is very true that the award does not state itself to be made of and concerning the premises, but the later decisions shew that this is unnecessary. It appears then that against the sum allowed by the Company to be due to *Brown* they claimed a set-off, aud it is objected that it does not appear by the award whether that set-off has been allowed; but I think it is sufficient, where there is a pecuniary claim on one side and a set-off on the other, for the award to state what is the balance due to either party. It is then objected, as one of the claims is for con-

(*a*) 5 Dowl. P. C. 17.

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tingent damages, that the award ought to have specified how much was due for the debt then accrued, and how much as a compensation for the damages to arise in futuro. It is clear that in general arbitrators have no jurisdiction over prospective damages, but, if parties choose to refer such matters, the award of course is binding. Such was the case here. It no doubt would have been more desirable, where such claims are referred together with claims for causes of action already accrued, that the arbitrators should discriminate in their award as to the several matters, for then it would enable the award to be pleaded in bar without further difficulty. But, though that is a more convenient course, I do not think it is strictly necessary, for there must be many cases where it is necessary, on an award being pleaded, to go into evidence, to shew whether the particular matters in dispute have been awarded upon or not. For instance, where mere matters of account have been referred, and a subsequent action is brought, it may be shewn that a particular item was part of an open account, not then gone into before the arbitrators. I therefore think that the award is not bad on this ground.

WILLIAMS J.—The objection to the award reduces itself to this, that, as one of *Brown*'s claims was for prospective damages, it does not appear on the face of the award that it has been arbitrated upon. But what is there on the award to shew that it has not? And if that be so, on the application of the test which has been suggested, and which seems a perfectly good one, evidence might be given to shew that the claim really had been considered.

COLERIDGE J.—The award cannot be said to be void on the face of it, unless on the ground that where several matters are referred the award should state specifically the finding on each. That perhaps would be the most convenient course to be adopted by the arbitrators, because then

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In re CROYDON CANAL Company.

the award would form a complete case as to the transactions in difference between the parties at the time of submission to arbitration. But no such rule exists. It is said that the award applies only to a *debt* due. But that is a stricter construction than the cases warrant. In *Gray* v. *Gwennap* (*a*), a cause and all matters in difference were referred by an order of nisi prius, and the arbitrator, after reciting the order, directed a verdict to be entered for the plaintiff with 2224*l.* damages, without stating that he made his award of and concerning the premises. It appeared by affidavit that, independently of the action, the plaintiff was indebted to the defendant in a sum of 200*l.*, which was the subject of inquiry before the arbitrator, and admitted by the plaintiff to be due, and it was objected that the arbitrator had not made his award as to all the matters referred to him. The Court however held that the fair meaning of the award was, that the arbitrator had found the sum in question to be due, after settling all the accounts between the parties. So I think in the present case; as several matters were in difference, and discussed before the arbitrators, it must be taken for granted that the arbitrators have found upon the whole. As to the question whether this award would be a defence on any future occasion, it clearly would be so with the use of parol evidence. It is said that a hardship is thereby thrown upon the Company, as the evidence may be lost, but that is an objection which may arise in every case.

Rule discharged with costs.

(*a*) 1 B. & Ald. 106.

1839.

Thursday, January 17th.

AMOR v. FEARON.

If a person hired on an annual service as clerk, to conduct an establishment for his master, set up a claim to be a partner, although in a respectful manner and bonâ fide, it is sufficient cause for the master to dismiss him without notice.

ASSUMPSIT. The declaration stated a special contract, by which, in consideration that the defendant would, on 1st July, 1831, enter into the service of the defendant in the capacity of a clerk and manager, to superintend and conduct a certain business of the defendant, to wit, the business of a dealer in wine and spirits, at an establishment of the defendant's in Bond Street, at a salary of 500*l.* a year, the defendant promised to retain and employ the plaintiff in his service, in the capacity aforesaid, for one whole year. Averment, that plaintiff entered and continued upon the service until 6th November, 1832, and was willing to have remained till the end of the current year; when the defendant, on the said 6th November, suddenly put an end to such service and employ, and then wrongfully dismissed and discharged the plaintiff therefrom, without any reasonable or probable cause whatever.

Pleas: 1st, non assumpsit; 2dly, that, at the time of the dismissal of the plaintiff from the service of the defendant, the plaintiff conducted himself in such an improper, offensive, disobedient, and insolent manner, that the defendant was forced and obliged to dismiss the plaintiff, and could not longer keep him in his service; without this that the defendant then wrongfully dismissed and discharged the plaintiff without any reasonable or probable cause, in manner and form &c.

At the trial before Lord *Denman* C. J. at Guildhall, at the sittings after last Michaelmas term, it appeared that the defendant, Mr. *Fearon,* who was a wine and spirit merchant on Holborn Hill, in 1830 had engaged the plaintiff to manage a similar concern of his in Bond Street, at a salary of 200*l.* per annum; and it appeared that from time to time certain additional sums were given, which the plaintiff contended were given him as one-fourth of the profits, but which the defendant contended were mere gra-

tuities. The plaintiff proved that he was dismissed the service on the 6th November, 1832. The defendant set up, as his ground for dismissing the plaintiff, that he had made a claim to be the defendant's partner; and to prove this he called a Mr. *Henderson*, who stated that he was sent for by Mr. *Fearon* to the Bond Street establishment on Nov. 6, and that he found there the plaintiff and the defendant; and that the defendant said to him (*Henderson*), "I have sent for you to come and manage this business." That the plaintiff said to the defendant, "Have you any wish to see my solicitor?" Mr. *Fearon* said "No;" upon which the plaintiff said, "Then I go on with the business as usual?" The defendant said, "We will see about that directly;" and ordered the plaintiff to quit. The plaintiff said, "When he was satisfied what he required, he would leave."

Mr. *Ashurst*, solicitor to Mr. *Fearon* in 1832, produced the following letter from the plaintiff's solicitor, written on the day after the dismissal:—

"Sir, 7th November, 1832.

"I beg to give you notice, on behalf of Mr. *John Amor*, that he is quite ready to resume his duty as a partner in the house in Bond Street; and I beg to be informed whether he will be assaulted if he proceed to do so, seeing that he was forcibly turned out yesterday. And I also beg to give you notice, that Mr. *Amor* will hold you responsible for any damage or loss the business may sustain by his exertions being forcibly withheld, and that he will not bear any part of the expense occasioned by any other party being employed to execute those duties which have hitherto devolved on himself, and which he is still ready to discharge.

"*H. B. Fearon*, Esq."

Mr. *Ashurst* also stated, that he saw the plaintiff on the day of the dismissal, and said to him, "You claim to be a partner, and that puts an end to your being here, therefore you must go." He also stated that he had an interview with the plaintiff's solicitor on the same day, and that the latter said, "You must feel he is a partner;" when *Ashurst* said, "No, he is not, and I must discharge him." It also appeared that the plaintiff had filed his bill in Chancery against the defendant, for an account of the partnership concern, which had been dismissed.

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Lord *Denman* C. J. left it to the jury to say whether the assertion of a claim by a clerk to be a partner was not a reasonable cause for dismissal; and observed that, if any servant set up a right to inspect his master's books, it was a claim so inconsistent with the relation of master and servant, that the master was quite justified in putting an end to it. The jury, in conformity with this direction, found a verdict for the defendant.

Thesiger now moved for a new trial, on the ground of misdirection. It is not for the jury to say what is a reasonable cause for the dismissal of a servant. The claim of the plaintiff to be a partner was not a justifiable cause for dismissal at a moment's warning, even if it had been made much more strenuously than in the present case. The instance put by his lordship to the jury is not quite analogous, for that is a case of gross insubordination, which of course would justify a master in dismissing a servant. *Parke* J. laid down the law in *Callo* v. *Brouncker* (*a*), as to what are justifiable causes for dismissal; viz. "any moral misconduct, either pecuniary or otherwise, wilful disobedience or habitual neglect." *Atkin* v. *Acton* (*b*), *Robinson* v. *Hindman* (*c*), *Spain* v. *Arnott* (*d*), *Turner* v. *Robinson* (*e*), and *Ridgway* v. *The Hungerford Market Company* (*f*), support this ruling of *Parke* J. But in the present case not even disobedience can be alleged against the plaintiff, for he stated his readiness to go on with the business as usual. It is submitted, therefore, that the defendant had no right to turn out the plaintiff at a moment's warning for asserting a bonâ fide claim to be a partner, and then to refuse payment of his salary. [Lord *Denman* C. J. That word "then" is very important; if the defendant had dismissed the plaintiff, and *then* refused to pay him his salary, it might have been different. But the plaintiff did not claim salary at the

(*a*) 4 C. & P. 518.
(*b*) 4 C. & P. 208.
(*c*) 3 Esp. 235.
(*d*) 2 Stark. Ca. 256.
(*e*) 5 B. & Ad. 789; *S. C.* 2 N. & M. 829.
(*f*) 3 A. & E. 171; *S. C.* 4 N. & M. 797. See also *Baillie* v. *Kell*, 4 Bing. N. C. 638.

time, but, it seems, filed a bill in Chancery as a partner, and did not bring his action for salary till five years afterwards.]

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LITTLEDALE J.—In *Callo* v. *Brouncker* (*a*) the rule laid down by my brother *Parke* is a very comprehensive one and quite well founded, but it does not exclude the present case. In all the instances cited the relation of master and servant was recognized on both sides, but here the plaintiff expressly disclaimed being a servant; and although he may have done so in respectful terms, yet it would be intolerable that a servant should be allowed to go round to his master's customers and represent himself as a partner, and thereby produce incalculable inconvenience, without the master having the power of dismissing him at once.

WILLIAMS J.—It is objected that the question of probable cause ought to have been decided by my lord, without any reference to the jury. The cause in this case was a matter of fact, and it was a question for them to decide whether there had been any disobedience, and whether the plaintiff had claimed to be a partner. The objection, however, seems to be, that my lord did lay down the law on the subject to the jury, and that they adopted it—in my opinion quite properly. If the jury thought that the plaintiff asserted his right to be a partner, it was a disclaimer of the relation of master and servant, which warranted the master in dismissing him.

COLERIDGE J.—The present has nothing to do with the cases cited, which relate to the misconduct of servants where the relation of master and servant has not been disclaimed. Here the plaintiff has assumed a character totally inconsistent with that of servant; and his offer to go on with the business as usual, was by no means an offer to go on as clerk, but as a partner in the business.

Lord DENMAN C.J. concurred.

Rule refused.

(*a*) 4 C. & P. 518.

1839.

Thursday, January 17th.

On an appeal against a rate under the Middlesex County Act, 3 *Geo.* 4, c. cvii. the justices confirmed the rate, subject to the opinion of the Court of Q. B. on a case. The certiorari directed the justices to send up an order of sessions "with all things touching the same;" and the Q. B. quashed the order of sessions; the sessions, after such order, were applied to to quash the rate, but refused, as the *rate* had not been removed into the Court of Q. B., and there was no longer any appeal against it. The Court of Q. B. refused to grant a mandamus to compel them to enter continuances, and quash the rate, first, because by so doing the parties who had been engaged in collecting the rate mi be exposed to an action; secondly, because the Court could not compel the session decide in a particular way.

A subsequent rate having been made by the Middlese ssessions, open to the s objection, pending the argument on the above case, but agains which no appeal made,—Held, that, as the objection was made express matter for an appeal to th sions, the appellants were not entitled to have the rate quashed on certiorari, it good upon the face of it.

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BODKIN, on a former day in this term, obtained a rule nisi, calling upon the defendants to enter continuances to the next quarter sessions, upon the appeal of the churchwardens and overseers of St. George's, Hanover Square, against a county rate, made on the 27th October, 1836, and to quash the rate.

It appeared by the affidavits on which the rule was obtained that, on an appeal against a county rate of the above date, by St. George's, Hanover Square, the Middlesex Quarter Sessions confirmed the rate, subject to the opinion of this Court upon a case (*a*), which was drawn up by the chairman, and which, after stating the case and the objections raised at sessions, concluded thus: "The Court therefore dismissed the appeal, subject to the opinion of the Court of Queen's Bench on the facts as above stated; and they further directed that, if that Court should be of opinion

(*a*) The rate was appealed against on the ground that by the local act for the county of Middlesex, 3 *Geo.* 4, c. cvii. (local and personal,) it is provided (by sect. 10) that a county rate shall not be made unless it appear that three-fourths of the money received on the last rate have been expended, and that on the making of the rate in question three-fourths had not been expended. It appeared by the affidavits that, on the first day of the sessions, when the treasurer gave in his account, three-fourths of the preceding rate had not been expended; but on a supplemental account given in by him during the sessions, and before the rate was made, he had less than one-fourth remaining in hand. The Court of Q. B. decided that the rate ought to be made according to the state of the accounts on the first day of the sessions.

that, under all the circumstances, the appellants were entitled to relief on one of the objections (*a*), then that the rate should be altered and amended under 3 *Geo.* 4, c. cvii. s. 16, by changing the date thereof from Oct. 27th to Nov. 10th." The case was argued in Michaelmas term last, when the Court decided that the rate was bad, and ordered "that the order of sessions made upon the appeal, &c. against a general county rate, be quashed for the insufficiency thereof." At the general sessions for the county, held on the 20th Dec. last, the chairman of the sessions laid before the justices the decision of this Court, and stated that, inasmuch as the rule of this Court did not quash the said rate, the justices would not be inconvenienced by the judgment; and on motion made on the 21st Dec. following, to quash the rate, the court refused to grant such motion, the chairman declaring that the appeal was no longer before the court, and that the court had no power to do any thing in the matter.

The certiorari, by which the case had been removed, commanded the justices to send "all and singular the said orders, with all things touching the same, as fully and perfectly as they have been made by you, and now remain in your custody or power."

Sir *J. Campbell* A. G. and *Prendergast*, now shewed cause. This rule cannot be made absolute; for the appellants, by their own laches, obtained a certiorari to remove the order of sessions only, not the rate. But by 12 *Geo.* 2, c. 29, s. 18, in order to give this Court jurisdiction to quash a rate, the rate itself must be removed; for that clause which gives a protection to parties who have been employed in the collection of an illegal rate, only speaks of rates to be quashed on certiorari. If therefore this rule should be made absolute, great hardship would accrue to such parties, for, the rate not being quashed on certiorari, they would be all liable to actions. Again; the Court never grants a man-

(*a*) See note (*a*), *ante*, p. 402.

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damus to a court below to give any particular decision, but only to hear and determine when they have jurisdiction. By the local act, 3 *Geo.* 4, c. cvii. s. 16, which gives an appeal to the sessions against a rate, the Court is empowered to quash, alter or amend the rate appealed against. In the present instance they have amended the rate, and have bowed to the authority of this Court. But the fatal objection to the rule is that, at the time the application was made to the sessions, they could not comply with it and quash the rate, as no appeal was before them.

Bodkin and *Doane*, contrà. The question is, whether the justices of Middlesex, after having prayed for the decision of the Court, are to be allowed to set it at defiance. [*Coleridge* J. Supposing the difficulty as to entering continuances were got over,—had the justices power to quash the rate at the time the application was made, except under circumstances in sect. 14 of 55 *Geo.* 3, c. 51, viz. "unless the justices shall deem it necessary to proceed to the making of an entire new rate."] That is the provision of the present county act; but the local act, 3 *Geo.* 4, c. cvii. s. 16, gives them express power to quash, alter or amend the rate; and after the solemn decision of this Court, that the rate was bad, it was clearly the duty of the Court below to quash the rate. The objection, that the rate itself was not removed, comes ill from the other side, as the chairman drew the case, and the certiorari directed the sending up all things "relating to the order." As to the want of power in this Court to dictate the decision to a court below, it must be observed that the justices who made the rate in question are in the nature of parties to the appeal. Besides, this Court was asked to amend the rate; but how could they if the rate was not here? The Court therefore may intend that the rate was removed. [Lord *Denman* C. J. What protection is there to parties who have collected a rate in obedience to an order of sessions, which is afterwards quashed?] The 12 *Geo.* 2, c. 29, s. 18, is quite large enough for that pur-

pose, for it speaks of rates quashed on any certiorari brought in any of his majesty's Courts of record at Westminster, or *otherwise*.

Lord DENMAN C. J.—I was anxious to see whether, by making this rule absolute, we should be able to give a protection to those parties who had collected the rate in question; but I am clearly of opinion that sect. 18 of 12 *Geo.* 2, c. 29, only extends to the case of rates quashed by the act of the superior Court itself. If therefore we should order this mandamus to go, we should expose the parties to an action, which must prevent us from making the rule absolute.

LITTLEDALE J.—We have no right to dictate to the sessions what judgment they ought to give. Perhaps they cannot conscientiously quash the rate, and think it ought to be amended only.

COLERIDGE J. (*a*)—We ought to adhere to the established rule, and not interfere by mandamus, when at the time the application was made the sessions had not the power of granting it. If, again, sect. 18 of 12 *Geo.* 2, c. 29, includes rates quashed at sessions, it appears to allude only to judicial acts of that Court, in which a discretion must necessarily be implied. In either view therefore this Court has no power to grant the writ.

Rule discharged.

Doane, upon a subsequent day in this term, obtained a rule nisi for a certiorari to remove into this Court the treasurer's accounts for the county of Middlesex, presented to the sessions on the 16th October, and the order of sessions made on the 1st November last, for making a county rate, and also the original rate itself.

(*a*) *Williams* J. being a parishioner of St. George's, gave no opinion.

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The affidavits set out circumstances, by which it appeared that the rate in question was bad, for the same reason as the rate which was discussed before the Court in Michaelmas term last; and that payment of the quota by the parish of St. George, Hanover Square, was demanded on 1st November last; but as the case was then pending for argument before this Court as to the validity of a similar rate, the parish took no notice of the demand. On the 21st the quota due from the parish was levied by distress.

By the order of sessions and rate removed upon the certiorari, the rate appeared good on the face of it. The affidavits in answer stated, that the treasurer's accounts had been delivered by him to the general quarter sessions, held on the 15th October last, and that they had been allowed at an adjournment of the same sessions on the 1st November last, and had not been appealed against.

Sir *J. Campbell* A.G. and *Prendergast* shewed cause against the rule (*a*). The ground on which this rate is objected to is, that it was made without three-fourths of the former rate having been duly expended previous to the new rate being made. But this, by the local act, 3 *Geo.* 4, c. cvii. s. 16, is made a special ground of appeal. The parties therefore should have applied to the sessions, and not have come here *per saltum*. Where an order of justices is good on the face of it, but some circumstance is brought forward on affidavits to shew that their jurisdiction had not accrued, the Court will quash the order; but where, as in the present case, there was clearly jurisdiction, and the objection is brought before the Court on affidavits as to some matter of fact, that is matter for an appeal only. The General County Rate Act, 12 *Geo.* 2, c. 29, s. 12, gives an appeal against a county rate, on the ground of overrating only; but the local act, sect. 16, gives a most extensive right of appeal. That being the case, the Court will not quash a rate good on the

(*a*) Before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

face of it, upon a frivolous objection: *Rex* v. *The Mayor of Gloucester* (*a*).

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Doane, contrà. The argument on the clause in 12 *Geo.* 2, c. 29, confining the right of appeal to cases of overrating, is strong evidence in favour of the present application; for it is clear that counties to which that act applies have no mode of quashing rates, bad on other grounds, except by certiorari. As other counties then have this advantage, there is no clause in the local act to deprive Middlesex of the certiorari also. And although it is true that the present rate might have been appealed against to the Middlesex sessions, it would have been futile to have done so, as their opinion was known; and if they had refused to grant a case, no redress could have been obtained, the rate being good on the face of it. [*Coleridge* J. The appeal clause in the local act, 3 *Geo.* 4, c. cvii. s. 16, by specifying this very objection which is relied upon as a ground of appeal, implies that that is the proper mode of taking the objection to it.]

Lord DENMAN C.J.—As the present rate is good upon the face of it, and the objection relied upon is a ground of appeal, which has in fact been actually insisted on with regard to a previous rate, the rule must be discharged (*b*).

LITTLEDALE and COLERIDGE Js. concurred.

Rule discharged.

(*a*) 5 T. R. 346.

(*b*) See note (*a*), *ante*, 405.

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Friday, January 18th.

Under the 7 *Geo.* 4, c. 57, s. 76, and 1 & 2 *Vict.* c. 110, s. 105, the seal of the Insolvent Debtors' Court proves itself.

DOE, on the demise of DUNCAN, *v.* EDWARDS.

EJECTMENT, brought in November, 1838, to recover premises which had been held by the defendant as tenant from year to year to the plaintiff. On the part of the plaintiff a six months' notice to quit was put in, dated March 24 of that year. The defendant endeavoured to shew that the tenancy commenced at Christmas, and that consequently the notice given was invalid. To prove a Michaelmas holding, the plaintiff produced a copy of the schedule filed by the defendant in the Insolvent Court, in 1837, and containing certain admissions as to the time when his rent became payable. The document purported to bear the seal of that Court. An objection that the seal of the Court should have been proved, was overruled, and the plaintiff obtained a verdict.

Neale now moved for a new trial, on the ground that the evidence of the defendant's schedule had been improperly received. The 7 *Geo.* 4, c. 57, s. 76, says, "that a copy of such petition, schedule, order, and other proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order or other proceeding, and sealed with the seal of the said Court, shall at all times be admitted in all courts whatever, and before commissioners of bankrupt and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said Court as aforesaid." Although this provision dispenses with all other proof, it requires that the seal itself should be proved to be the seal of the Court. This construction is borne out by the 1 & 2 *Vict.* c. 110, s. 105, which incorporates the provision cited from the 76th section of the 7 *Geo.* 4, c. 57, but omits the words at the end of it, "further than that the same is sealed with the

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seal of the said Court as aforesaid," for the purpose of dispensing with the proof requisite to the authentication of documents under the former act.

Lord DENMAN C. J.—When a court is constituted by act of parliament, and has a seal given it, we do not call upon an officer of that court to prove the seal, but are bound to take judicial notice of it.

LITTLEDALE and WILLIAMS Js. concurred.

COLERIDGE J.—The 7 *Geo.* 4, c. 57, by the words "without any proof given of the same further than that the same is sealed with the seal of the said Court," does not mean that the seal is the only thing necessary to be proved, but that the seal shall itself be the instrument of proof.

Rule refused.

The QUEEN *v.* The Inhabitants of STOGUMBER.

Saturday, January 19th.

By an order of removal, dated 4th Sept., the wife of a prisoner confined in Bristol gaol for debt, for 100 days, expiring on Nov. 21st, was removed from the parish where she had resided with her husband, and in which the gaol was situated, to her husband's settlement parish. During the imprisonment she had liberty to visit her husband:—Held, that the order of removal was bad, as a separation of man and wife.

UPON an appeal against an order of justices, dated the 4th September, 1837, for the removal of *Sarah Stafford*, wife of *George Stafford*, a prisoner confined in Bristol gaol, and her five children, from the parish of Bedminster, in the city of Bristol, to Stogumber, in the county of Somerset, the Bristol Quarter Sessions confirmed the order, subject to the opinion of the Court on the following case:—

George Stafford, the husband of *Sarah* and father of *Sarah's* five children, was proved to be settled by birth in the parish of Stogumber, and that he had lawfully married the pauper *Sarah*, and that the five children were the issue of such marriage. *Sarah* and her five children had become chargeable to the parish of Bedminster at the date of the

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order, at which time the said *George Stafford* was confined in Bristol gaol, which is situated in the parish of Bedminster, in execution for 11*l.* and upwards, under the provisions of the Bristol Court of Requests Act, for 100 days, which expired on the 21st of November, 1837. At the expiration of the said 100 days, *George Stafford* was regularly discharged, and returned to his house in Bedminster, to his wife and family, he being the tenant of such house for the last fifteen years, and supported his wife and family there by his labour as a sawyer, and which he has continued to do since his discharge from prison and return to them. During the imprisonment of *George Stafford*, his wife was at liberty, at the times and in the manner which the rules of the prison permitted, to visit her husband.

The question for the opinion of the Court is, whether, under the circumstances, the order for the removal of *Sarah Stafford* and her five children from Bedminster to Stogumber, is a good and valid order. If the Court should be of that opinion, the order is to be confirmed; but if otherwise, quashed.

Jardine and *Butt* now supported the order of sessions. There is no doubt on the general principle of law, that an order of removal of the wife without the husband, is bad, because it is against the policy of the law that man and wife should be separated; *St. Michael in Bath* v. *Nunny*(*a*); and because it is presumed that whilst the husband lives he is capable of supporting his wife. But these principles do not apply in the present case, for the husband and wife were already separated; and although it is true that a species of *consortium* might exist, it was of the most limited nature. The 52 *Geo.* 3, c. 160, s. 3, which enables the parish in which a gaol is situated to obtain a suspended order for the removal of any pauper in custody, applies only to prisoners in custody on mesne process. Besides, in the present case the wife only was chargeable, for Bristol being a

(*a*) 1 Str. 544.

county gaol, the prisoners within it are supported by the county at large, and not by the parish: a suspended order therefore would not have been applicable. In *Rex* v. *Eltham* (*a*) it was held that the removal of the wife of a Scotchman, who had no settlement in England, to her settlement parish, was good. If this order be invalid on the ground of its separating man and wife, then it follows that the wife of a felon sentenced to imprisonment for years, or of a debtor who refuses to take the benefit of the Insolvent Debtors' Act, is irremovable. [*Coleridge* J. Could the wife be charged as a vagrant for returning, after her husband came out of gaol?] Perhaps she might, although an order to remove her then, without her husband, would be bad. But it may be intended that the wife was removed with the consent of her husband, for nothing is to be presumed against an order. In *St. Michael in Bath* v. *Nunny* (*b*), the residence of the husband in the parish to which the wife was removed was presumed by the Court. So in *Rex* v. *Stockton* (*c*) the same point was presumed by the Court. In *Rex* v. *Tibbenham* (*d*) the Court held, that an order removing a married woman whose husband had left her, and who was pregnant with a bastard child, was good.

Erle, contrà. The cases, referred to, of a felon convict and of a debtor imprisoned for a long course of years, might require consideration; but there is nothing in the circumstances of the present case to take it out of the general principle of the law, which forbids the separation of man and wife. The 49 *Geo.* 3, c. 124, which enables the justices to grant suspended orders in certain cases, strongly illustrates this principle; for the preamble of sect. 3 is, "in order to avoid any pretence of forcibly separating husband and wife, be it enacted, &c."

But it is said that the Court may presume that the hus-

(*a*) 5 East, 113.
(*b*) 1 Str. 544.
(*c*) 5 B. & Ad. 546; *S. C.* 2 N. & M. 353.
(*d*) 9 East, 388.

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band gives his consent for the wife's removal, and *Rex* v. *Eltham* (*a*) is cited. [*Coleridge* J. There the order stated the consent of the husband.] And in *Rex* v. *Leeds* (*b*), which was since the stat. 59 *Geo.* 3, c. 12, s. 33, enabling the justices to remove a Scotchman, with no settlement in England, and his family, to Scotland, it was held that, even with the consent of the husband, his wife could not be removed to her maiden settlement. It is true that in *Rex* v. *Stockton* (*c*), and in other cases there cited, wives have been removed, and the orders have been silent as to the husband; but in such cases this Court supported the order, on the ground that it would not intend that the husband and wife were living in the same parish. But here it is quite clear that the wife had the opportunity daily of seeing her husband, and of living entirely under his control. Secondly, if the wife could be removed at all, the husband should have been removed too; for otherwise the difficulty suggested by the Court arises; the wife being removed, would commit a breach of duty in returning, and yet the husband, when he got out of gaol, might be able to support himself and family in the removing parish.

Lord DENMAN C. J.—It is clear in this case that the parties were residing in the same parish, and that there might have been a *consortium* between them, which it is the policy of the law not to interrupt. No consent on the part of the husband, nor any thing equivalent to it, appears on the face of the case.

LITTLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Order of Sessions quashed.

(*a*) 5 East, 113.
(*b*) 4 B. & Ald. 498.
(*c*) 5 B. & Ad. 546; *S. C.* 2 N M. 353.

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The QUEEN *v.* READ.

An order of filiation, made upon the oath of the mother, and upon evidence in corroboration thereof, without stating it to be of some material particular, is bad.

PRENDERGAST, in Easter term last, had obtained a rule nisi to quash the following order of sessions, which had been brought up on certiorari:—

"Whereas the several parishes and places comprised in the Ipswich Union, in the county of Suffolk, are situate within the town and borough of Ipswich; and whereas application was made to the last General Quarter Sessions of the peace, &c. by the guardians of the poor of the said Union, concerning a male bastard child, of which *Maria Hare*, single woman, was then lately delivered, and which had then lately become chargeable to the parish of St. Clement, one of the said parishes comprised in the said Union," &c. &c. "Upon due examination of the cause and circumstances of the premises, as well upon the oath of the said *Maria Hare* as upon evidence in corroboration thereof, in the presence of the said *William Read*, it is adjudged," &c.

O'Malley now shewed cause. It is objected, amongst other things (*a*), that the order does not state the mother to have been corroborated in any material particular; but the objection is frivolous. The sessions decided not only upon evidence of the mother, but upon evidence in corroboration. The evidence in corroboration must have been of some material particular, or it could not corroborate the evidence of the mother. If it was of some immaterial particular, it might weaken the evidence, but could not carry it further. Supposing even the terms used to be equivocal, the Court will presume every thing in favour of an order: *Rex* v. *Aire and Calder Navigation* (*b*), *Rex* v. *Cornish* (*c*). [*Coleridge* J. You must contend then that the words "material particular" are idle. Suppose some part of the evidence of the woman was as to her good character, and that was corroborated,—would that be sufficient?] That

(*a*) It was objected to the order that the application should have been made by the overseers of St. Clement, and not by the guardians of the Union, (see *Regina* v. *James*, *post*, p. 422,) or that, at all events, the payment should have been directed to be made to St. Clement's, as the child was not chargeable to the Union; but the Court gave no opinion on these points.

(*b*) 2 T. R. 666.

(*c*) 2 B. & Ad. 502.

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would be a forced construction. Evidence as to her character would be irrelevant; and this Court should not presume that the sessions entertained an immaterial issue.

Lord DENMAN C. J.—If this case were doubtful, we might intend on the most favourable side; but there is clearly an omission of a particular, without which the sessions had no jurisdiction. In *Rex* v. *The Aire and Calder Navigation* (*a*), it was stated in the case that the rate was duly made; upon which the presumption proceeded that the sessions did not mean to raise any question about its publication.

LITTLEDALE J.—The word "*material*" is the very essence of the jurisdiction, and that which chiefly distinguishes the new section from the old law.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute to quash the order of sessions.

(*a*) 2 T. R. 666.

The QUEEN *v.* The Inhabitants of STAFFORD (*a*).
The QUEEN *v.* The Inhabitants of COSTOCK.

1. Legitimate children above seven years of age, but under sixteen, of a woman who has married again, if chargeable to the parish where they reside with their mother, and father-in-law may be removed to their late father's settlement parish, notwithstanding 4 & 5 *Will.* 4, c. 76, s. 57.

2. No objection, which is not stated in the grounds of appeal, can be taken, either at sessions or in this Court, to an order of removal, although such objection appear on the face of the case sent up from the sessions.

ON appeal to the Midsummer quarter sessions, 1838, for the West Riding of Yorkshire, against an order for the removal of *John Blackbourne* and two other children of *John Blackbourne* deceased, by *Ann* his wife, from the township of Maltby, in the said Riding, to the township of Stafford, in the county of Stafford; the sessions confirmed the order as to the two elder children (the youngest child being within the age of nurture), subject to the opinion of this Court on the following case:

(*a*) This and the following case, decided in Trinity term, June 1, 1839, being upon subjects of immediate interest, have been inserted here.

Ann Ford, the mother of the three children named in the order, is now the wife of *James Ford*, to whom she was married in October, 1836. Her late husband, who died in 1834, was settled in Stafford. The question is, whether the two elder children of *John Blakbourne*, both of whom, at the time of making the order, were above the age of seven years, and have gained no settlement in their own right, are removeable from Maltby to Stafford, their late father's settlement, *James Ford*, their stepfather (whose settlement is in Maltby), having run away and left his wife and her aforesaid children chargeable to the township of Maltby. If the Court should be of opinion that the children are so removeable, the original order and order of sessions to stand, otherwise both orders to be quashed.

J. Ingham and *Pashley*, in support of the order of sessions. The only question in this case is, whether the paupers, who are above the age of seven years, are removeable from Maltby, the place of their stepfather's settlement, to Stafford, the place of their deceased father's settlement. The 4 & 5 *Will.* 4, c. 76, s. 57, says, "that every man who, from and after the passing of this act, shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly." In *Rex* v. *Walthamstow* (*a*), the Court decided that such children do not acquire the settlement of the stepfather; and *Coleridge* J. observed, "the object of the legislature appears to be, not so much to keep the children with the mother, as to make the second husband defray the ex-

(*a*) 6 A. & E. 301; *S. C.* 1 N. & P. 460.

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pense of the maintenance, and for that purpose the children are declared part of his family." In *Regina* v. *Wendron* (*a*), the Court went a step farther, and decided that the settlement of an illegitimate child, whose mother subsequently married, was not even suspended, and that it was properly removed to its birth settlement, Lord *Denman* C. J. saying that the section just cited was framed "with a view rather to relief than settlement." There is nothing, therefore, in the new Poor Law Act to affect the settlement of these paupers, so that, being both above the age of nurture, they were rightly removed to the settlement of their deceased father, notwithstanding the new liability thrown by the act on the stepfather to pay for their maintenance.

Sir *G. Lewin* and *Dundas*, contrà. *Rex* v. *Walthamstow* (*b*) and *Regina* v. *Wendron* (*a*) have decided that the settlement of the children in question is not affected by the recent act, and leave the question untouched of their removeability from the stepfather's parish. And it is to be observed, that in the former case the order of removal adjudicated that the stepfather's parish was the place of the children's *settlement*, and was bad on that account, though it might have been sustained, if it had not so adjudicated; and in the latter case the removal was made by a *third* parish, in which at all events the child had no claim to remain, to the place of the birth settlement. It does not follow, because such removal was primâ facie right, that the birth parish might not have removed the children to the stepfather's parish. Here, the question is raised between the immediate parishes of the deceased father and of the stepfather. By section 71, a bastard child is to follow the settlement of its mother, until such child shall attain the age of sixteen. That may serve as a guide as to what is to be done with these legitimate children under the same age. It is undoubtedly a great evil that they should be

(*a*) 7 A. & E. 819; *S. C.* 3 N. & P. 62.

(*b*) 6 A. & E. 301; *S. C.* 1 N. & P. 460.

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separated from the mother, and the Court will therefore, if it can do so, intend that the legislature had for one of its objects, in making them part of the stepfather's family, that they should be maintained until sixteen together with her. If he be of ability to maintain them, surely they cannot be removed. In this case he has absconded; but the mother is left behind, and it will hardly be contended that they are to be shifted backwards and forwards accordingly as he may for the time being be possessed, or not, of the ability to maintain them. In *Lang* v. *Spicer* (*a*), Lord *Abinger* C. B. appears to have thought that in a case like the present the children would of course be maintained in the stepfather's parish, for, in considering the liability of a husband to support his wife's illegitimate child, born before the marriage, he says, "There is no reason why we should speculate on what would be the situation or claims of the parties, if the husband were incompetent to maintain the child: the effect of that would undoubtedly be, under this act, to bring the burden of himself, and all his family, upon the parish."

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In *The Queen* v. *Costock*, which the Court desired to hear argued at the same time, the same point was raised.

On appeal to the Michaelmas quarter sessions, 1838, for the county of Nottingham, against an order for the removal of *Lucy* and *Joseph Dexter*, from the parish of Radford to the parish of Costock, both in the said county of Nottingham, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The paupers, *Lucy Dexter*, aged eight years, and *Joseph Dexter*, aged six years, are the legitimate children of *Joseph Dexter* and *Susannah* his wife. In September, 1834, *Joseph Dexter* died, being at the time of his death lawfully settled in the appellant parish of Costock. In August, 1836, *Susannah*, his widow, was married to *William Marville*, who is lawfully settled in the respondent parish of

(*a*) 1 M. & W. 129.

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Radford, and at the time of the making of the order appealed against, her two children, the paupers, were residing with her, in the workhouse of the respondent parish of Radford, and actually chargeable in the respondent parish.

The grounds of appeal, as stated in the notice, were as follows: "The parish of Costock appeals against the removal of *Lucy* and *Joseph Dexter*, from the parish of Radford, because the 4 & 5 *Will.* 4, c. 76, s. 57, enacts that every man who shall marry a woman having a child or children, shall be liable to maintain such child or children, as a part of his family. Nor in the case of the stepfather of these children is there sufficient evidence that he is unable to maintain them without the assistance of his parish, until and only so long as he is receiving relief in the workhouse. The parish of Costock does not deny the settlement of these children, but only their liability for their support, so long as they are under the age of sixteen and their mother shall continue the wife of *William Marville*."

No evidence was offered on either side as to the circumstances of *William Marville*. If the Court shall be of opinion that the paupers were not removable for the reasons stated in the notice, the order of sessions to be quashed. If the Court shall be of the contrary opinion, the order of sessions to be confirmed.

N. R. Clarke and *Wildman*, in support of the order of sessions. The only material difference between the preceding and the present case is, that here one of the children was within the age of nurture; but as that point was not raised in the statement of the grounds of appeal, it cannot be relied on now; *Rex* v. *Withernwick* (*a*). It may be said that this Court is bound to notice a defect apparent on the face of the order of removal, although the sessions could not: the same argument, however, was urged ineffectually in the case just cited. *Rex* v. *Bromyard* (*b*), and *Rex* v.

(*a*) 6 A. & E. 273; *S. C.* 1 N. & P. 423.

(*b*) 8 B. & C. 240; *S. C.* 2 M. & R. 280.

Boultbee (*a*), are authorities for the same practice with respect to defects apparent on the face of a poor rate and a conviction.

Whitehurst and *Willmore*, contrà. Here it appears, from the case stated by the sessions, that one of the children was within the age of nurture; so that this Court has jurisdiction given to it, and the sessions also might have entertained the question. Although the new act may not have contemplated any direct interference in the relations between parish and parish with respect to the subject under discussion, yet it clearly intended that infants should not be separated from the mother. The former husband may have had no settlement at all; or, in the case of illegitimate children, they may have each had a different birth settlement. Are they then to be scattered in different parishes when the stepfather is unable to maintain them, and collected again as soon as he is of ability? By common law a father has a right to the custody of his children, and by this statute these children become part of the family of the stepfather. [*Patteson* J. They are so for the purposes of this act, but it does not appear that nurture is one of its purposes.] He is to maintain them, and maintenance is one of its purposes. The 13 & 14 *Car.* 2, c. 12, does not apply to make an infant removeable without reference to its parents, for an infant in itself cannot be deemed "a native, householder, sojourner, apprentice, or servant." The law has given children the settlement of their father, and on his death that of the mother, to prevent the evils of their removal from parental care. The 57th section does not simply enact that the stepfather shall be liable to maintain these children, but adds "as a part of his family," which is something more. He is also to be *chargeable* with all relief given to such children. Now he can only be chargeable to his own parish, which, therefore, must necessarily be the parish to give relief to the children.

(*a*) 4 A. & E. 498; *S.C.* 6 N. & M. 28.

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Again, by the 56th section, relief given to such *children* is to be considered as relief given to *him*. The same reasoning applies, Who is to relieve him? His own parish. That parish, therefore, is to relieve the *children* also. The same section also furnishes another objection to this order; it is apparent on the face of the case that the children were not chargeable, as the relief is to be considered as given to the stepfather. The statute with respect to such children extends the age of nurture to the age of sixteen, in order to make them, up to such age, inseparable from the parent. If this construction be not adopted, there will be great difficulty in carrying out other provisions of the statute. By sect. 58, relief given to any part of a poor person's family under sixteen, may be declared to be given by way of loan, for the repayment of which, by the next section, his wages may be attached, and the payment may be *recovered* against his employer in the same way that penalties are recoverable by the 99th section. Now this last-mentioned clause provides that the penalties shall be paid to the use of the parish where the offence has been committed. So that if these children are not to be kept with the stepfather in the parish in which he misconducts himself, that parish will get the benefit of the fine, although it does not bear any portion of the expense of their maintenance. [*Patteson* J. The act says that the loan is to be *recovered* like penalties: that merely means that payment is to be *inforced* in the same way with penalties, not that it is to go to the same parish.] Then the parish to which the children are removed may have to attach the stepfather's wages in the most distant parish in the kingdom. The act rather seems to have made the stepfather chargeable for relief given to stepchildren, for the very purpose of making them irremoveable.

Lord DENMAN C. J.—I am of opinion that the sessions have come to a right conclusion in these cases. The settlement of the paupers is not at all affected by the liability of the stepfather to maintain them, and there is nothing in the act to lead to a contrary doctrine. A further point has

been made in the second case, that the child within the age of nurture could not have been removeable at all, and that neither child could have been chargeable. But those points were not raised in the statement of the grounds of appeal, and cannot be raised now. It is highly important that notice should be given by the appellants of every objection which they mean to rely on. If this objection had been pointed out, the respondents might have been able to meet it at the sessions.

LITTLEDALE J. concurred.

PATTESON J.—*Rex* v. *Walthamstow* (*a*) has decided that the 57th section does not operate to change the settlement of children, under the circumstances therein provided for; and *Rex* v. *Wendron* (*b*) that it is not suspended for all purposes. Were these children then properly removed? It is said that the legislature intended that they should not be separated, before the age of sixteen, from their parents. Suppose the stepfather to die, when one of these children is only eight years old; the mother would remain in his parish, and the children would be removed from her to the place of their deceased father's settlement. So much for the alleged object of the legislature to keep them with the mother. I was struck with the ingenious argument of Mr. *Willmore* as to the difficulty of carrying into execution the 59th section, if the children are held removeable from the family of the stepfather. The inconvenience mentioned may certainly happen, and the children might be removed to Cornwall, and justices of that county have to attach wages in the hands of his employer in Lancashire. But the words of the 57th section are satisfied by holding that the stepfather is liable to reimburse the settlement parish of the children the costs of any relief given to them. If he should return and be of ability to maintain them, the question, whether he may be compelled to have them removed back again, may be settled when it arises.

(*a*) 7 A. & E. 819; *S. C.* 3 N. & P. 62.

(*b*) 6 A. & E. 301; *S. C.* 1 N. & P. 460.

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WILLIAMS J.—It has been suggested that the construction contended for by the appellants may be justified by intendment drawn from the 71st section. We have, however, had sufficient warning against liberal intendments, from the number of cases in our books with respect to binding of apprentices for a less period than expressed in the statute, and with respect to constructive service and dispensations, and other matters which have complicated our poor law with difficulties and niceties equal to any that may be met with in the most abstruse question on contingent remainders.

Order of Sessions confirmed.

The QUEEN *v.* JAMES (*a*).

Notice of an intended application for a bastardy order may be signed by the churchwardens and overseers of a parish, although it forms part of a union, and returns a member to the board of guardians, under 4 & 5 *Will.* 4, c. 76.

AT the Midsummer quarter sessions, 1838, for the county of Carmarthen, an application was made by the churchwardens and overseers of the parish of Comvil in Elvet, in that county, for a bastardy order against the defendant, under the 4 & 5 *Will.* 4, c. 76, to reimburse the said parish for the support of a bastard which had become chargeable to that parish, when the sessions made the order, subject to the opinion of this Court upon the following case:—

The applicants having gone through the necessary proof and satisfied the Court by corroborative evidence as to the liability of *Theophilus James*, an objection was raised on his behalf to the sufficiency of the notice of the application, which was proved to have been duly served on him. The case here set out the notice, (which stated the usual particulars,) and was signed by three persons as the churchwarden and overseers of the parish.

It was admitted that the parish of Comvil in Elvet was one of several parishes united by the commissioners under the provisions of the statute 4 & 5 *Will.* 4, c. 76, in a union called "The Carmarthen Union," and that it returned one

(*a*) Decided in Trinity term, the 1st June, 1839.

guardian as its proportion to the board, and that the notice was only signed by the churchwarden and overseers of the parish, and not by the guardian returned by the parish, or by any other guardian of the union. The objection taken to its sufficiency was to the following effect: that the guardian of the parish was the person who ought to have signed the notice, and not the churchwarden and overseers; and that since the formation of unions under the said Poor Law Act, the churchwardens and overseers of any parish, being within a union, and returning a guardian to the board, are not the proper persons to sign notices of this description. It was also contended for the respondent, that at all events the notice should be signed by the guardians of the union, or a competent part thereof. And further, that it is not competent for the churchwardens and overseers, as such, to sign the notice after the formation of a union, of which the said parish was a component part. The Court of Quarter Sessions overruled the objection, subject to the opinion of this Court.

Chilton appeared to support the order of sessions, but the Court called on

E. V. Williams and *Nicholl*, contrà. The notice ought to have been signed by the guardians. The 72d section provides "that when any child shall hereafter be born a bastard, and shall, by reason of the inability of the mother of such child to provide for its maintenance, become chargeable to any parish, the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions of the peace within the jurisdiction of which such parish or union shall be situate, after such child shall become chargeable, for an order upon the person whom they shall charge with being the putative father of such child, to reimburse such parish or union for its maintenance

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and support." By section 73 no such application is to be heard "unless fourteen days' notice shall have been given, under the hands of such overseers or guardians, to the person intended to be charged with being the father of such child, of such intended application;" and if upon the hearing the Court shall make no order thereon, "it shall order and direct that the full costs and charges incurred by the person so intended to be charged in resisting such application, shall be paid by such overseers or guardians." In sections 79, 80, and 81, also, "overseers or guardians" are introduced as the parties to the proceedings therein mentioned. The present question does not relate merely to the formal signature of a bastardy notice, but is substantially a question whether, where a parish is part of a union, the application for a bastardy order can be made by the overseers, or whether it ought not to be made exclusively by the guardians. In grammatical construction, no doubt, the application may in all cases be made either by one class of officers or the other; it remains therefore to be considered, in this case, which construction is the more convenient and the more consistent with the other provisions of the act. The 72d section may certainly mean that either overseers or guardians may apply and give notice. But if *either* may apply, *both* may do so. Suppose them both to apply for an order on the *same* putative father, and the first application by the overseers to be refused, the guardians may then be heard, and, as the bench at sessions is a fluctuating body, they may succeed on the identical evidence which had been deemed insufficient. Such a construction would sometimes operate harshly on the individual charged, who might be harassed a second time in the same matter. Or, again, suppose two different individuals to be applied against in respect of the same child, this absurdity might ensue, that both applications might be granted. Such a construction might also be inconvenient in other respects, because if, where a parish forms part of a union the overseers may apply, the order would be to reimburse

the parish, although the expenses would fall principally on the union, for the parish contribution is struck upon an average, and it would be but slightly affected by the increase of the union expenses. This inconvenience would be very palpable in the case of unions having a common rating and common expenditure as one parish, under sections 33, 34, 35, and 36. The true construction, therefore, is to read the 72d section, reddendo singula singulis, that guardians are to apply in the case of a union, and overseers to do so in the case of an isolated parish. The other construction would not only be inconvenient, but would be inconsistent with the provisions as to guardians, under *Gilbert*'s Act, the 22 *Geo.* 3, c. 83, s. 7, and with other provisions of this act. By section 54, the administration of relief to the poor is entirely withdrawn from overseers, in places where guardians are appointed, and is vested in such guardians; and it has lately been held in *Regina* v. *The Justices of Cambridgeshire* (*a*), that an application for a bastardy order is connected with the relief of the poor. It is obvious also that the general scope of the act was to leave as little discretionary power as possible to be exercised by the churchwardens and overseers.

Lord DENMAN C. J.—I think that this is a good notice, and that the legislature intended that it might be given by the overseers.

LITTLEDALE J.—I think that either the guardians or the overseers might have given it.

PATTESON J.—Mr. *Williams* very ingeniously argued that this notice was bad because the parish had no interest in the subject. But there is no common fund for the relief of the poor in unions. Under section 28 there is certainly a common fund "for the common use or benefit, or on the common account of such parishes," as for the building of a

(*a*) 7 A. & E. 480; *S. C. ante*, 249.

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workhouse; but section 26 expressly provides that, notwithstanding its forming part of a union, each parish shall be *separately* chargeable with the expense of its own poor; so that the argument of Mr. *Williams* is unfounded.

WILLIAMS J. concurred.

Order of Sessions confirmed.

The QUEEN *v.* The Inhabitants of CAVERSWALL (*a*).

Under 6 *Geo.* 4, c. 57, no settlement is gained by the hiring and occupation of a tenement as joint-tenant, although the half of the rent paid by the pauper amount to 10*l.*

ON appeal against an order for the removal of *Charlotte Lawton* and her children from the parish of Burslem, in the county of Stafford, to the parish of Caverswall, in the same county, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

It was admitted by the appellants that *Daniel Lawton*, late the husband of the pauper *C. L.*, was settled in Caverswall at the time he went to reside in Burslem, as hereinafter mentioned. It was admitted by the respondents that *D. L.*, during the years 1828, 1829, 1830, and 1831, rented bonâ fide a dwelling-house in Burslem, at the rent of 7*l.* a year, and occupied and paid the rent and poor rates for the same, during the whole of that time, under that renting; and that *D. L.*, during all the time he so rented and occupied the dwelling-house, also rented bonâ fide a building called a potwork, jointly with one *E. A.*, at the rent of 15*l.* a year for part of the time, and 17*l.* a year for the remainder of the time, and occupied the same jointly with *E. A.* under such renting, and paid a moiety, at least, of the rent and poor rates due for the same, during the whole of that period.

The question for the consideration of the Court is, whether the paupers have acquired a settlement in Burslem under the 6 *Geo.* 4, c. 57. If the Court should be of that opinion, the order of sessions is to be quashed. If the

(*a*) Decided in Trinity term, the 1st June, 1839.

Court should be of a contrary opinion, the order of sessions is to be confirmed.

F. V. Lee in support of the order of sessions. The 6 *Geo.* 4, c. 57, enacts, "that no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting or paying parochial rates for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or buildings, or of land, or of both, bonâ fide rented by such person, in such parish or township, at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, actually paid, for the term of one whole year at the least." It seems to have been decided that distinct buildings under distinct hirings by one person may be occupied so as to confer a settlement. The question now arises whether a settlement is gained where the tenement has been hired by distinct persons as joint-tenants. There are many dicta to shew that no settlement is gained. In *Rex* v. *Wootton* (*a*), *Patteson* J. observed, "I have always thought that the words 'separate and distinct dwelling-house or building,' in these statutes, meant separate and distinct as to any other person;" and *Williams* J., in the same case, makes similar observations. In *Rex* v. *Great and Little Usworth* (*b*), also, *Patteson* J. reiterates his opinion. *Rex* v. *Kniveton* (*c*) is an old case, not under this statute; no inference, therefore, can be drawn from it, though it appears there that a settlement would have been gained if the rents of the tenements, one of which was held in joint-tenancy, had together amounted to 10*l.*

(*a*) 1 A. & E. 232; *S. C.* 3 N. & M. 312.

(*b*) 5 A. & E. 261; *S. C.* 6 N. & M. 811.

(*c*) 1 Burr. S. C. 499.

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Whateley, contrà. A decided inference may be drawn from *Rex* v. *Great Wakering* (*a*), which was a case under this very statute. There premises were let to the pauper and another as joint-tenants at 16*l.* a year; and it was held that a settlement was not acquired, because the pauper did not occupy, in his own right, a tenement of more than 8*l.* a year value. It is clear, therefore, that the settlement would have been held good if the value had been sufficient, as in this case. [Lord *Denman* C. J. That is not a very sound argument; we only want one valid ground for our decision.] At all events the dicta of *Patteson* and *Williams* Js. meant only that a settlement would be defeated if the tenant had lodgers: here the pauper's husband was joint-tenant, and had, therefore, a legal interest in the whole tenement.

Lord DENMAN C. J.—I am not aware that this question can be decided by reference to any previous cases. But I think that the words "separate and distinct," in the statute meant that the tenant must be unconnected with any other person, and be a separate occupier.

LITTLEDALE J. concurred.

PATTESON J.—I am of the same opinion, and it appears from the reports that I have been so for some time past.

WILLIAMS J. concurred.

Order of Sessions confirmed.

(*a*) 5 B. & Ad. 971; *S. C.* 3 N. & M. 47.

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Tuesday, January 22d.

M'CARTHY *v.* COLVIN and others.

ASSUMPSIT for money had and received, money lent, for interest, and on an account stated.

Pleas: 1. non assumpsit; 2. as to 419*l.* 18*s.* 9*d.*, parcel &c., the defendants say that true it is the said sum of 419*l.* 18*s.* 9*d.* was received by the defendants for the use of the plaintiff, to wit, on the 20th December, 1832, but the defendants say that the said last-mentioned sum of money was so then received by the defendants for the use of the plaintiff, for the sole and specific purpose of the same being remitted by the defendants for and on account of the plaintiff, who then was in certain parts beyond the seas, to wit, at Calcutta, in the East Indies, to certain persons then carrying on business as merchants and East India agents at Calcutta aforesaid, under the name, style and firm of Messrs. *Colvin* & Co., for certain reasonable commission and reward to defendants in that behalf, and to be deducted from the said last-mentioned sum of money. And defendants say that, within a reasonable time after the receipt of the said last-mentioned sum of money by the defendants, to wit, on the 8th January, 1833, the said last-mentioned sum of money, the said reasonable commission and reward of the defendants in that behalf, to wit, 4*l.* 9*s.*, having been first deducted therefrom, was duly remitted by the defendants for and on account of the plaintiff to the said persons so carrying on business as aforesaid, at Calcutta, under the name &c., according to the purposes for which the defendants received the same. Verification.

Replication to this plea: that the said sum of 419*l.* 18*s.* was not remitted by the said defendants for and on account of the said plaintiff, to the said Messrs. *Colvin* & Co., modo et formâ.

At the trial at the sittings after Trinity term, 1836, at

The plaintiff in Calcutta wrote to his agent in England to transmit to him a sum of money through the defendants' house, to be placed to his credit there. His agent shewed his instructions to the defendants, and paid them the money, who placed it in their books to the credit of their correspondents in Calcutta, and sent them a letter of advice to account for it to the plaintiff. Before this letter reached Calcutta their correspondents failed, but the defendants had, between the date of the letter and the failure, accepted bills, drawn by their correspondents before the receipt of such letter, to an amount exceeding the money paid in by the plaintiff:—Held, that the money could not be recovered from the defendants, for that they had done all that they were instructed or were bound to do, and the situation in which they stood towards their correspondents had been thereby altered.

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Guildhall, before Lord *Denman* C. J., the plaintiff proved a payment by his agent in London of 419*l.* 18*s.*, on account of the plaintiff, into the house of the defendants in London, who gave him the following receipt:

" Received, London, 20th December, 1832, of *William Casterton*, Esq., the sum of 419*l.* 18*s.* 9*d.*, on account of *W. G. M'Carthy*, Esq., of Calcutta.

" *Bazett, Colvin, Crawford* & Co."

Mr. *Casterton* proved also that, at the time of paying this money, nothing passed as to the mode of transmitting the amount to the plaintiff, who was then at Calcutta. It also appeared that the house of *Colvin* & Co. stopped payment on the 2d May, 1833, and that at that time, and for six months previously, there was a sum of 5000*l.* and upwards due from the said *Colvin* & Co. to the defendants. It was admitted by the plaintiff that, on the 21st August, 1833, he received a letter from the assignee of *Colvin* & Co. at Calcutta, stating, that on the 20th May, 1833, the late firm of *Colvin* & Co. had received advices from Messrs. *Bazett* & Co. of London, of the sum of 419*l.* 18*s.* 9*d.* having been paid to them by Mr. *Casterton*, and that they passed it to the credit of Messrs. *Colvin* & Co. as instructed.

The defendants proved that the following letter from the plaintiff had been received by the defendants, and forwarded by them to Mr. *Casterton*, his agent.

" Calcutta, May 9th, 1832.

" Sir,—I have this day drawn on you, in favour of Messrs. *Colvin* & Co., for the sum of 300*l.*, at sixty days' sight, you will therefore take the necessary steps to sell out my stock in the Bank, and after duly honoring the above draft, and deducting all necessary expenses, I will thank you to transmit the surplus through the house of Messrs. *Colvin, Bazett* & Co., to be placed to my credit here.

" *W. G. M'Carthy.*

" *Wm. Casterton*, Esq."

It also appeared that on the 8th January, 1833, the defendants wrote a letter to *Colvin* & Co., Calcutta, from which the following is an extract:

" 8th January, 1833.

" No. 266. Enclosed Mr. *M'Carthy's* bill on Mr. *Casterton* for 300*l.*, which is accepted and passed to your account. This gentleman

has paid us the balance of his account with Mr. *M'Carthy*, which we enclose, and place the money, as you desire, to credit of your account.

	£.	s.	d.
Balance received, 20th ultimo	419	18	9
Less our commission 1 per cent. . £4 4 0			
Receipt stamp 0 5 0			
	4	9	0
	£415	9	9

which you will account to Mr. *M'Carthy* for, at 1*s.* 10*d.* per rupee.

" *Colvin, Bazett* & Co.

" To Messrs. *Colvin* & Co., Calcutta."

The defendants also proved that the house in Calcutta and the house in London were distinct, and that, after the defendants had given *Colvin* & Co. in Calcutta credit for the 419*l.*, the latter had drawn bills on the defendants, which had been accepted, to the amount of 13,000*l.*

Lord *Denman* C. J. was of opinion, on these facts, that, as the defendants sent advice to *Colvin* & Co. of the receipt of the plaintiff's money in a reasonable time (which was found by the jury), the defendants were discharged of their liability, although *Colvin* & Co. failed before the letter reached Calcutta, and his lordship nonsuited the plaintiff, giving him leave to move to enter a verdict for 419*l.* 18*s.*

Sir *F. Pollock* having obtained a rule nisi accordingly, in Michaelmas term, 1836,

Sir *J. Campbell* A. G. and *Bazett*, shewed cause in Hilary term last (*a*). The special plea in the present case confesses and avoids the plaintiff's case, and the facts proved at the trial would have supported a plea of payment, à fortiori the plea in question. It appeared by the plaintiff's letter to his agent *Casterton*, which was sent through the defendants' house, that he desired the money to be remitted to his credit at Calcutta. If therefore the money was remitted in the ordinary mode and within a reasonable time, the defendants are entitled to a verdict. It was established to the satisfaction of the jury, that the advice given to the Calcutta house by the letter of 8th January, 1833,

(*a*) Jan. 27th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

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was in reasonable time; the only question therefore is, whether passing a sum of money to the credit of another house, and accepting liabilities upon the strength of it, is equivalent to remitting the money to them. Now it is a clear principle of law, that, if money is paid over to an agent, to be remitted to a principal, and a countermand be given to the agent, before he has done any thing in the business, or in any way changed his situation upon it with regard to his principal, the money may be recovered back from him. But if the agent has given new credit, accepted fresh bills, or advanced any further sum upon it, then the principal must be resorted to, and not the agent; *Buller* v. *Harrison* (*a*), *Cox* v. *Prentice* (*b*). In the latter case Lord *Ellenborough* C. J. stated, "I take it to be clear that an agent who receives money for his principal is liable as a principal, so long as he stands in his original situation: and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent." It was proved in the present case, that the defendants had accepted bills to the amount of 13,000*l.*, after giving the Calcutta house credit for the sum paid in by the plaintiff. Suppose, on the day after the defendants had given that firm credit for the sum in question, a bill from the Calcutta firm to the same amount had been presented to them for acceptance, the defendants would have been liable in an action to the Calcutta firm, if they had refused to accept the bill. How then can it be contended that, as the defendants had undergone this risk, they are also to be liable for the solvency of the Calcutta house? It appears that all the profit to the defendants in the transaction is one per cent., it is obvious, therefore, that no such extraordinary risk was contemplated.

Sir *F. Pollock*, contrà. The doctrine deduced from *Buller* v. *Harrison* (*a*) and *Cox* v. *Prentice* (*b*), cannot aid the defendant, for there has been no change of circumstances in the present case. It is true that the Calcutta house drew

(*a*) Cowp. 565. (*b*) 3 Mau. & S. 344.

bills on the defendants after the latter had given them credit for the plaintiff's money, but they could not have drawn upon the strength of that credit, as the bills were previously drawn, and the letter of the 8th January did not arrive in Calcutta till after the house failed. Suppose the transaction had been between London and Liverpool, and that the plaintiff had paid in money to a London house, who had given him an order upon a house in Liverpool, and on his arrival there he had found the house had failed, could the London house then have claimed to retain the money, to set off against debts due from the Liverpool house? It appears that the plaintiff's money was paid in to the defendants on December 20th. Suppose the Calcutta house had failed on December 19th, on whom then would the loss have fallen? It is admitted that, if the defendants had done nothing upon the money being paid in, they would have been liable. But it is clear they have done nothing, for the bills were drawn by the Calcutta house in ignorance of the payment, and would have been accepted if the plaintiff's money had not been paid in. It seems absurd to say that there was any change of circumstances on this small sum being paid in, when the two houses were drawing on one another to such a vast extent. There was nothing to shew that the Calcutta house owed less on the 8th January, when the letter of advice was written them, than when they drew upon the defendants. It is not true that the defendants would have been liable for not accepting a bill after the money had been paid in, because they would have shewn that the money was paid in for a special purpose, namely, to remit. It appears that the defendants wrote to *Colvin* & Co. that they had given them credit for the amount at 1*s.* 10*d.* a rupee, but it is clear that might have been below the rate of exchange, and *Colvin* & Co. might have refused to accept the credit on these terms; or they might have said, on receiving the letter, we are not solvent, we cannot pay the plaintiff, therefore we will not accept the credit. The Calcutta house therefore might have exercised an option, and accordingly,

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until the London house heard that the Calcutta house accepted the credit, they continued to hold the money to the use of the plaintiff. [*Littledale* J. Suppose the plaintiff's agent had gone to the defendants with a countermand the week after the money had been paid in, and after the defendants had advised the Calcutta house of it, could he have demanded back the money then?] He must have waited to see whether the Calcutta house accepted the credit and drew on this particular fund. If his countermand arrived in India before they had drawn a bill, then he would be entitled to recover the money back. There was therefore no change of circumstances, and the simple question is, whether the risk as to the solvency of the Calcutta house is to be upon the party who pays in the money, or upon the party who accepts a per centage for remitting.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was a motion to set aside a nonsuit which had passed at the trial before me under the following circumstances: The plaintiff in Calcutta had by letter, dated in May, 1832, directed his agent *Casterton* to sell out stock standing in his name in the English funds, and after making certain payments, "to transmit the surplus through the house of *Colvin, Bazett* & Co. (the defendants), to be placed to his credit there" (at Calcutta). *Casterton* accordingly having made the sale and the payments, carried 419*l.*, the surplus, to the defendants, and shewed them his letter of instructions, and immediately placed it in their books. They received the money to the credit of their correspondents at Calcutta, and gave a receipt for the money on the 20th day of December, 1832, as for so much received on account of the plaintiff.

On the 8th January (1833), being the earliest opportunity, the defendants wrote to their correspondents at Calcutta a letter, containing as follows:—*Casterton* has paid us the balance of his account with *M'Carthy*, which we enclose,

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and place the money, as you desire, to the credit of your account, 419*l.* less commission &c., which you will account to Mr. *M'Carthy* for, at so much (specifying the rate) per rupee, being the current rate of the day.

After this date the defendants accepted and paid bills drawn by the Calcutta house on them, to an amount far exceeding the sum in question.

Before the letter of the defendants reached Calcutta, the house there had stopped payment. This was the amount of the proof on the trial.

The plea stated a receipt of the money for the sole purpose of being remitted for and on account of plaintiff, who was then at Calcutta, *to certain persons then trading there under the firm of* (describing the Calcutta firm), for a certain reasonable commission, to be therefore paid to the defendants, and then averred that the money was so remitted. The replication traversed only the remittal modo et formâ.

The plaintiff therefore admits that the defendants received the money charged only with the duty of remitting it to their Calcutta correspondents, and the question is, whether the passing the sum to their credit in account, coupled with the subsequent acceptance and payment of bills drawn by that house, amounts to a remitting of the money to them. On the part of the defendants, the decisions in *Buller* v. *Harrison* (*a*) and *Cox* v. *Prentice* (*b*), were not questioned; but they relied upon the presence of the very circumstances, as they said, in this case, on the absence of which in those the decisions had proceeded. In the former, Lord *Mansfield* said, "In this case there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced; in short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th April." The plaintiff's counsel admitted the inference to be drawn from this remark of Lord *Mansfield*, but they met the effect by alleging that here also was no change of situation between the two houses after the 20th Decem-

(*a*) Cowp. 565. (*b*) 3 M. & S. 344.

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ber, because on the one hand the Calcutta house, not knowing of the fact of this payment, could not be taken to have drawn upon the London house on the credit of it; and on the other, although new acceptances were given and paid by the London house, yet as their receipts were not shewn subsequently to the 20th December, it did not appear that any change in the turn of the *balance* between the houses had arisen. We do not think these answers satisfactory; the question is, whether the defendants have done all which, looking at all the circumstances of the case, was within the contemplation of both parties cast upon them.

The plaintiff desires nothing to be done out of the usual course; not a transmission of money or a bill specifically appropriated to himself. We cannot but take notice that either of these methods, or any similar one, would have been very unusual in a case like the present, and it lay upon the plaintiff specifically to have stated it, if he wished it to be pursued, and that, if for no other reason, because the defendants were entitled to the exercise of an option whether they would undertake such an agency or not. The plaintiff, however, merely requests that the "surplus may be transmitted through the defendants' house, to be placed to his credit at Calcutta." The fair import of this direction, from which the contract between the parties must be collected, is, that the defendants on their part should take all means in the usual course towards giving the plaintiff credit at Calcutta, for the sum mentioned. This they appear to have done, when they placed it in their books to the credit of their correspondents at Calcutta, and sent them a letter of advice to that effect.

And from that moment their condition was altered, for if the Calcutta house, being solvent, should not repudiate the letter, the defendants would be bound by it. And in the meantime they had made themselves liable to be bound according to an election to be exercised in Calcutta, over which they had no control. The fact of acceptances subsequently given and paid is material under the circumstance

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of insolvency, which has since occurred at Calcutta; for if nothing of that kind had been done, and the insolvency had supervened, which might be said to determine the power of the Calcutta house to accept the letter of credit, it might then perhaps have been contended that all that the defendants had done had become merely nugatory, and the plaintiff's money still remaining in their hands must have been accounted for by them.

As a ground, however, for construing the contract between the parties, or determining the duties cast on the defendants, the insolvency is quite immaterial, for it was clearly in the contemplation of neither at the time; and there is nothing from which it can be inferred that the defendants were to insure the plaintiff against the insolvency of their correspondents, or any house at Calcutta, with whom they might have given him credit.

We decide the case, however, on the broad ground that the defendants have done all they were intended or contracted to do, and this rule therefore will be discharged.

Rule discharged.

FARRAR, CALVERLEY and another *v.* HUCHINSON.

Wednesday, January 23d.

Where a receipt has been given by one partner in the name of the firm, but without the knowledge of the other partners, such receipt is not conclusive evidence against the firm in an action by them for their demand.

ASSUMPSIT on a bill of exchange, drawn by the plaintiffs under the firm and title of *Farrar, Calverley* & Co., for 50*l.*, and accepted by the defendant. Counts also for goods sold and delivered, and on an account stated. Plea; payment. The particulars of demand stated the action to be brought to recover a balance of 26*l.* due upon a bill of 50*l.*, accepted by the defendant in favour of the plaintiffs.

On the trial at the sittings in Middlesex after last Michaelmas term, before Lord *Denman* C. J., it appeared that the plaintiffs had been card makers and partners at Elland, in Yorkshire, and that the defendant, who was a card maker in Manchester, had had dealings with the plain-

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tiffs, and had given them a bill for 50*l.*, dated 28th August, 1837, which was dishonoured at maturity. The plaintiffs became bankrupts on 13th July, 1838, and the action was carried on in the names of the assignees. The defendant, in proof of his plea of payment, proved the following receipt given to him by *Farrar*, one of the plaintiffs:

"Cash and goods from *Benjamin Huchinson* at different times 50*l.*, and expenses to take up the acceptance given to us on the 28th August last, at three months date, and returned to Mr. *Morril*, and is now in his hands. January 9th, 1838.

"*Farrar, Calverley* & Co.

"Manchester, January 9th, 1838."

The counsel for the plaintiffs proved that after the date of the receipt the defendant had been applied to for payment of the bill, and that he had acknowledged a balance due from himself of 23*l.* 1*s.* 11*d.*, without making any allusion to the receipt in question; and contended that it might have been given after the bankruptcy, and antedated to defeat the assignees. His lordship left it to the jury to say whether there had been any payment by the defendant, and stated that the receipt might be evidence of it, but that it was not conclusive. The jury found a verdict for the plaintiffs for 23*l.* 1*s.* 11*d.*

Cresswell, on a former day in this term (*a*), moved for a new trial, on the ground of misdirection. One of the plaintiffs on record having given a receipt, it was an answer to the action. In *Alner* v. *George* (*b*), where, in an action for goods sold, the defendant proved a receipt in full by the plaintiff, Lord *Ellenborough* C. J. held, that the trustees of the plaintiff, who were carrying on the action in his name, were not entitled to prove that the receipt was given collusively by the plaintiff to the defendant in order to defeat the action. [Lord *Denman* C. J. There are few cases not accurately reported in that book; but I confess I doubt that decision. One partner has no right to give a receipt for

(*a*) January 17th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(*b*) 1 Camp. 392.

the firm when no money passes.] In *Scaife* v. *Jackson* (*a*) it was held that a receipt given by one partner in fraud of another was not binding; but there was nothing here to shew that the other partners did not concur. As the assignees have put themselves into the bankrupt's place, they are bound by the same equities. [*Littledale* J. If the receipt operates as an estoppel, you should have pleaded it.]

Lord DENMAN C. J.—As there may be some question whether, as this receipt was given by a party on the record, it is not conclusive, we will consider the point.

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—The question in this case is, whether, when a receipt has been given by one of several partners, without the knowledge of the rest, and an action is brought by the firm to recover the demand, evidence is admissible on the part of the plaintiffs to shew that the receipt was fraudulently given by their co-plaintiff. The case of *Alner* v. *George* (*b*) was relied upon by the defendant; but it is not directly applicable, because here other persons in partnership with the plaintiff were interested; and in the note to the above case the reporter has stated a case of *Benson* v. *Bennett*, where the plaintiff had given the defendant a receipt in full of all demands, but, as it appeared at the trial that the receipt was obtained by the misrepresentation of the defendant, *Mansfield* C. J. held that the receipt was not binding. We think that in all cases a receipt is only primâ facie evidence, which admits of an explanation; and that if the jury thought that the receipt was given to defraud the other partners or the assignees, they were properly directed, and therefore that there must be no rule.

Rule refused.

(*a*) 3 B. & C. 421; *S.C.* 5 D. & R. 290. (*b*) 1 Camp. 392.

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Thursday, January 24th.

DOE, on the several demises of JENKIN PHILLIP and WALTERS, *v.* MARGARET BENJAMIN.

A. being tenant in possession as a yearly tenant, entered into the following memorandum of agreement with *B.* his landlord, in the middle of a current half-year: "*B.* agrees to let the farm of —— to *A.* for the term of fourteen years, determinable at the end of seven years, at the option of either party, upon giving twelve months' previous notice, at and for the yearly rent of 20*l.* a year, payable half-yearly, without any deduction whatever. A lease to be drawn up on the usual terms, and the said *A.* agrees to take it upon the said terms:"— Held, that the above instrument amounted to a lease, although the effect of it might be to cause a surrender of the previous term, and to merge the rent accruing due for the current half-year.

EJECTMENT for a farm in the parish of Mothvey, in the county of Carmarthen, on demises of 1st October, 1836.

At the trial before *Coleridge* J., at the Carmarthenshire spring assizes, 1837, the lessors of the plaintiff proved an acknowledgment of tenancy on a Michaelmas holding, by the husband of the defendant, in 1831, as tenant from year to year, at 20*l.* a year, to *Phillip*, the lessor of the plaintiff, and a notice to quit at Michaelmas, dated 14th March, 1836, to the defendant by *Phillip*, who had granted a lease of the premises to *Walters*, dated November 28, 1835, to commence from the Michaelmas following. The defendant's husband died in November, 1835, and the defendant was his administratrix. The counsel for the defendant stated that they should prove an agreement for a lease for fourteen years, from *Phillip* to *William Benjamin*, dated 13th December, 1834, and a lease actually executed in pursuance thereof. On production, however, of the lease, it appeared to have been executed after the lease to *Walters*, and after action brought. The agreement was stamped with a 1*l.* stamp, and was as follows:

"Memorandum of an agreement made the 13th day of December, 1834, between *Jenkin Phillip* of the one part, and *William Benjamin* of the other part; the said *Jenkin Phillip* agrees to let the farm of Cefngwrych and Tirbach to the said *William Benjamin*, for the term of fourteen years, determinable at the end of seven years, at the option of either party, upon giving twelve months' previous notice, at and for the yearly rent or sum of 20*l.*, payable half-yearly, without any deduction whatever. A lease to be drawn up on the usual terms by Mr. *Thomas Bishop*, and the said *William Benjamin* agrees to take it upon the said terms. As witness our hands.

"Signed, &c."

The learned judge was of opinion that *Phillip*, by entering into this agreement, had disabled himself from giving a

notice to quit, and the verdict passed for the defendant, with leave to move to enter it for the plaintiff.

J. Evans, in Easter term, 1837, moved accordingly, and contended that no interest passed under the above instrument, as it was an agreement merely, and not a lease, distinguishing *Poole* v. *Bentley* (*a*), *Doe* v. *Groves* (*b*), and relying upon *Hamerton* v. *Stead* (*c*), 4 *Bac. Abr.* Leases (K), and *John* v. *Jenkins* (*d*).

Chilton and *W. M. James*, now shewed cause. There can be no doubt, in accordance with the current of recent decisions, that this instrument is a lease; *Staniforth* v. *Fox* (*e*), *Warman* v. *Faithfull* (*f*), *Chapman* v. *Bluck* (*g*). Wherever the instrument contains words of present demise, it amounts to a lease, and the stipulation that a future lease is to be executed is immaterial; *Doe* v. *Groves* (*b*), *Barry* v. *Nugent* (*h*). The case of *John* v. *Jenkins* (*d*) is easily distinguishable, for there the agreement contained conditions on which the demise was to take effect, which were never fulfilled. It may be said, perhaps, that this instrument is not a lease, because it does not appear on what day the term is to commence, but a lease of a term without a date commences upon the day of delivery, according to *Com. Dig.* Estates, (G 8), citing *Co. Litt.* 46. So in *Doe* v. *Ries* (*i*), where the instrument did not express the day on which the term was to begin, it was held notwithstanding to be a lease.

J. Evans and *E. V. Williams*, contrà. The case of the defendant at the trial was, that there was a clear answer to the plaintiff's case, as the defendant had an agreement for a lease, and a lease executed in consequence. This instrument therefore was put in as an agreement, but the lease

(*a*) 12 East, 168.
(*b*) 15 East, 244.
(*c*) 3 B. & C. 478; *S. C.* 5 D. & R. 206.
(*d*) 3 Tyrw. 170; *S. C.* 1 C. & M. 227.
(*e*) 7 Bing. 790.
(*f*) 5 B. & Ad. 1042; *S. C.* 3 N. & M. 137.
(*g*) 4 Bing. N. C. 187.
(*h*) Cited in 5 T. R. 165.
(*i*) 8 Bing. 178.

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afterwards turned out to have been made after the lease executed to *Walters*. If this instrument had been tendered as a lease it would have been inadmissible, as it had only an agreement stamp. Even therefore if it be a lease, the plaintiff is estopped from relying upon it as such, for it is evident that the plaintiff could not object to its admissibility when tendered as an agreement. The very stamp shews that it was the intention of the parties throughout to treat it as an agreement. In *Morgan* v. *Bissell* (*a*), the distinction was taken, that if the instrument was intended to convey the immediate possession, it operated as a lease, but not otherwise. So also in *Hamerton* v. *Stead* (*b*). But here, the defendant's husband was in possession as a tenant from year to year, this instrument therefore was clearly not intended to give him immediate possession, and therefore it falls within the reasoning of *Best* Serjt., arguendo in *Morgan* v. *Bissell* (*a*), which was confirmed by the judgment of the Court. [*Littledale* J. The instrument must be construed according to the terms it contains, and not by any number of facts to be imported into it.] There are decisions contrary to that position; for instance, *Doe* v. *Ashburner* (*c*), where *Ashurst* J. said, "whether the instrument were a lease or an agreement, depended upon the intention of the parties, which must be collected from the terms of the agreement and from collateral circumstances;" and *Baxter* v. *Browne* (*d*), where the conduct of the parties, after the agreement, was relied on; but it must be confessed that the doctrine on which those cases are founded does not seem sound. But all that it is necessary to contend for is, that on the construction of a lease, as of a will, you are entitled to look at the state of the subject-matter at the time the instrument is made, which is very different from looking at any circumstances that may arise afterwards. In the present case, it appears that this memorandum of agreement is made between a tenant in possession and his landlord, and is an agreement for a term of years to

(*a*) 3 Taunt. 65.
(*b*) 3 B. & C. 478; *S.C.* 5 D. & R. 206.
(*c*) 5 T. R. 168.
(*d*) 2 W. Bl. 973.

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be granted by lease. Now if this instrument amounts to a present lease, it must operate as a surrender of the former tenancy from year to year; and as the surrender was in the middle of the half-year, for the holding commenced at Michaelmas, the accruing half-year's rent must have been given up also; but is it to be conceived that such was the intention of the parties? The very fact of the agreement not containing any date as to when the demise was to begin, shews that it only had relation to a contract of lease to be made at a future time. Besides which, the agreement relates to a lease to be executed on the usual terms, and there is nothing to shew what those terms are, which was the very ground of the decision in *Morgan* v. *Bissell* (*a*). In *Doe* v. *Ries* (*b*), the first day of payment was fixed, which shewed conclusively that the relation contemplated could be no other than that of landlord and tenant. So in *Doe* v. *Groves* (*c*), because the instrument conveyed the possession at once, it was held to be a lease, but that could not be the effect of the present instrument, as the tenant was already in possession. This case is of the first impression, for scarcely in any other was the relation of landlord and tenant in existence, where the instrument came in question, except in *John* v. *Jenkins* (*d*), and there the instrument was held to be an agreement only.

Lord DENMAN C. J.—The facts of this case I understand to be that the defendant's husband was tenant from year to year to *Phillip*, the lessor of the plaintiff, at 20*l.* a year, and whilst that tenancy existed this written memorandum is entered into between them. After that memorandum, *Phillip* gives the defendant notice to quit at Michaelmas, 1836, and then leases the farm to the other lessor of the plaintiff, who brings ejectment in October, in the same year. The plaintiff having proved at the trial the

(*a*) 3 Taunt. 65.
(*b*) 8 Bing. 178.
(*c*) 15 East, 244.
(*d*) 3 Tyrw. 170; *S. C.* 1 C. & M. 227.

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yearly tenancy, and notice to quit, the defendant proposed to prove an agreement to execute a lease for fourteen years, and a lease actually executed, but which on production appeared to be posterior in date to a lease granted to *Walters*, the other lessor of the plaintiff; and it possibly was thought that the posterior lease would relate back to the date of the agreement. The verdict having passed for the defendant, on the ground that the agreement itself amounted to a lease Mr. *Evans* moved for a new trial, contending that the instrument in question was an agreement merely, and not a lease and he cited a number of cases. It is said now that the plaintiff cannot rely on this instrument as a lease, because it was introduced by a sort of stratagem as an agreement, and that the defendant was thereby precluded from taking the objection to which it was open as a lease. In my opinion, the moment the instrument was relied upon as a lease, was the proper time for taking the objection arising from the want of stamp. If it had been then taken, the objection would have been fatal, but both parties seem to have relied on the question, whether the instrument was a lease or not.

The next question therefore is, whether this is a lease, or an agreement only. I am of opinion it is a lease. The tenant is in possession, and the landlord says I will give you a lease for a term of fourteen years in the premises, and as the words are sufficient to constitute a present demise, I do not think that the fact of the tenant being in possession can make any difference. But it is said here that this is a stronger case than most of those in which the instrument has been held to be an agreement, for that it is stipulated that the lease shall contain the usual covenants, and that there is nothing to shew what those covenants were to be; and *Morgan* v. *Bissell* (*a*) is relied on, more however for the arguments of counsel, than for the decision of the Court. *Mansfield* C. J., it is true, held there that when the instrument appears on the face of it to be an agreement, if the parties intend by it to give a future lease, it shall be an

(*a*) 3 Taunt. 65.

agreement only, notwithstanding there are words of present demise; but that is overruled.

Lastly. It is said that, it being uncertain when the term is to begin, this instrument cannot operate as a lease. But the passage in *Co. Litt.* 46 b, which *Comyn* has adopted (*a*), shews that in point of law, a lease, without stating the commencement of the term, takes effect from the day of its execution. It is contended that the effect of such a lease would be to operate as a surrender of the former term, which I dare say the parties never contemplated, and therefore that it clearly could not be the intention of the parties to create a present demise. I do not know how that might be, and should wish to consider whether that would be the strict legal consequence. Perhaps, as the lease was without date, it was intended to commence with the commencement of the ensuing half-year, but whatever was the intention of the parties, and whether they contemplated these consequences or not, they are bound by the legal effect of the instruments they enter into.

Littledale J.—Three objections may be made to this instrument as a lease. First, that it states that *Phillip agrees* to let and *Benjamin agrees* to take; but it was decided long ago that the use of the word *agree* does not conclude the question. Second, it may be said that, as there is an agreement for a future lease, it ought only to be construed as an agreement, and perhaps it would have been better if all such instruments, with a similar clause in them, had been treated as agreements, and not as leases; but it is too late to take this distinction. Third, that the terms of the future lease are not specified; but if this instrument be a present demise, it is immaterial that the parties have left the terms of the further assurance to be settled hereafter.

Williams J.—I was much struck with the argument, that the defendant at the trial first of all relied upon this

(*a*) Com. Dig. Estates, (G 8).

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instrument as an agreement only. But the note of the argument on the rule nisi removes all difficulty on that point, as it shews that the whole contest between the parties was, whether this memorandum was a lease or an agreement, and Mr. *Evans* discussed that very numerous class of cases in which the question has been raised. We ought to avoid adding any new distinctions to the principles laid down, if we can find any decided case which may govern the present. Now *Staniforth* v. *Fox* (*a*) is very similar, and in the essential circumstances I find it impossible to distinguish them. The only remaining difficulty is, that *Phillip*, the landlord, never could have contemplated giving up half a year's rent; and it is probable that no layman would have contemplated that result, or all the legal consequences which might flow from such an act. But that is clearly immaterial.

COLERIDGE J.—The only point is, whether this is an agreement for a lease, or a lease; and although not unnaturally the Courts have arrived at some inconsistent conclusions from the same premises, in the numerous cases that have come before them on the point, the principle pursued has always been the same, viz. to discover the intention of the parties. I agree also that the mode of construing the agreement is by looking into the instrument, and taking into consideration the surrounding circumstances; and I think that the argument, which has been urged as to the accruing rent, and the intention of the parties with regard to it, very legitimate. This then being the principle to be applied, it may be that some parts of the agreement tend to shew that it is an agreement, and some that it is a lease. But on the whole, striving to keep the current of decisions as uniform as possible, I think it amounts to a lease, although it is probable the parties did not contemplate the legal consequences of their acts.

Rule discharged.

(*a*) 7 Bing. 590.

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LIDSTER *v.* BORROW.

Friday, January 25th.

A gamekeeper acting under a deputation granted and registered before the 1 & 2 *Will.* 4, c. 32, is not entitled to notice of action under sect. 47 of that act.

TROVER for two greyhounds, Pleas: 1. Not guilty. 2. That the plaintiff was not possessed.

On the trial, before *Patteson* J., at the Durham spring assizes 1837, the defence was, that the defendant had seised the dogs in the due discharge of his duty as a gamekeeper. To prove his appointment as a gamekeeper a deputation was put in, dated 1814, and duly registered. It was then contended that the plaintiff must be nonsuited, as he had given the defendant no notice of action pursuant to 1 & 2 *Will.* 4, c. 32, s. 47, which says, "and for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant, one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon." To this it was objected that the defendant was not within the protection of the act, as he had not taken out a fresh deputation under the act. The learned judge overruled the objection and directed a nonsuit.

Knowles, in Easter term, 1837, having obtained a rule nisi for a new trial,

Alexander and *J. Ingham* now shewed cause, and admitted that it had been decided in *Bush* v. *Green* (*a*), that a gamekeeper acting under a deputation granted and registered before the new act, was not entitled to notice of action, but contended, that at all events he was entitled to

(*a*) 4 Bing. N. C. 41.

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such notice as a servant of his employer under the 36th section, which authorizes the servant of the owner of land to take from persons trespassing on it, in pursuit of game, any game which shall appear to have been recently killed. It is immaterial that the particular act complained of in this action, was not the act authorized by that section; the defendant, at all events, filled the character of a servant, which is protected by it.

Knowles, contrà. The point now raised was virtually involved in the case already decided, for it was an action brought against the master who had adopted the act of his servant.

PER CURIAM (*a*).—There is no reason to depart from the authority of *Bush* v. *Green*, and this rule must be made absolute.

Rule absolute.

(*a*) Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams*, Js.

Saturday, January 26th.

DOE *d.* WILLIS *v.* BIRCHMORE and another.

The owner of a cottage, divided into two parts, in 1808 put in two servants *H.* and *W.* to occupy it, who occupied each part severally till his death, in 1814, without paying any rent. They continued to occupy, undisturbed, after his death, till 1821, when *H.* died, having by his will devised his moiety to *W.* *H.*, some time before his death, took in *L.* to live with him, as a servant, and after *H.*'s death *L.* continued in possession:—Held, on ejectment brought by *W.*, that by proving *L.* to have come in under *H.*, he had shewn a primâ facie title.

The defendant in the above ejectment, who defended under the landlord's rule, proposed to call *L.* as a witness, on the ground that he was not the tenant in possession, but a mere servant:—Held, that *L.* was incompetent, as the defendant had admitted him to be tenant in possession by the rule.

EJECTMENT for part of a cottage at Leatherhead, in the county of Surrey. At the trial at the Surrey spring assizes, 1837, before *Tindal* C. J., the plaintiff proved that a Mr. *Clear* built the cottage in question in 1808, for his wife to reside in after his death, and that in the meantime he put in *Willis*, the lessor of the plaintiff, and *Hammond*, who were two old servants of his, to occupy the different halves of the cottage. Mrs. *Clear* died in 1813, and Mr. *Clear* in 1814. *Willis* and *Hammond* continued to occupy

their respective halves till 1821, without paying any rent for them. In that year *Hammond* died, and by his will devised all his interest in the half of the cottage to *Willis*. Three or four years before *Hammond*'s death, a person of the name of *Lee* came to live with him as servant, to take care of him, and after his death continued in possession of his half of the cottage up to the time of the ejectment brought. The declaration in the ejectment was served upon *Lee*, and the defendants came in on the consent rule to defend as landlords. The counsel for the defendants on these facts contended that there must be a nonsuit, as *Hammond* had acquired no title in the premises, his occupation being merely by sufferance from 1808 to 1814, and therefore that, if an adverse possession were relied upon, no title by it had accrued in 1821; the Lord Chief Justice thought that the occupation by *Willis* might be coupled with that of *Hammond*, upon which the defendants called witnesses, and claimed to be the heirs at law of *Clear*, but did not make out their title; they then proposed to call *Lee*, the tenant in possession, to shew that he was permitted by the defendants to continue in possession of his half of the cottage on the condition of leaving when required; he was however rejected as an incompetent witness. His lordship directed the jury to find for the plaintiff, but gave the defendants leave to move to enter a nonsuit.

Platt, in Easter term, 1837, having obtained a rule accordingly for a nonsuit or a new trial, on the grounds that no title had accrued by twenty years' adverse possession, and that *Lee*, as a mere servant of the defendants, was a competent witness,

Channell now shewed cause. It is not contended that the lessor of the plaintiff had obtained a title by twenty years' adverse possession, under 3 & 4 *Will.* 4, c. 27, but as ejectment is a possessory action, and as it was shewn that *Lee* came into possession under *Hammond*, the question is to be considered as between those two, and therefore

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possession for a single day or hour is a sufficient primâ facie case against the defendants. If the defendants had shewn themselves to be the feoffees or heirs at law of *Clear*, they would have entitled themselves to a verdict. But they claim as landlords of *Lee*, and yet shew no connexion with him. That being so, *Lee* was clearly incompetent, for a verdict for the plaintiff would immediately turn him out of possession; *Doe* v. *Wilde* (*a*), *Doe* v. *Tyler* (*b*), per *Tindal* C. J. [Lord *Denman* C. J. It is contended that *Lee* was only the servant of the defendants.] The defendants cannot allege that, for they have come in under the consent rule to defend as his landlords.

Platt and *Shee*, contrà. The lessor of the plaintiff must succeed on the strength of his own title, but he has failed here to shew any. The lessor of the plaintiff attempted to couple the possession of *Hammond*, from 1814, with his own, from 1821, up to the time of the ejectment, but that is insufficient, because when 3 & 4 *Will.* 4, c. 27, passed (July, 1833), there had not been twenty years' adverse possession, and therefore, by section 15, the heirs of *Clear* would have five years to bring an ejectment for the premises; *Doe* d. *Burgess* v. *Thompson* (*c*). Besides which, the twenty years' possession required by the act must be an uninterrupted possession; *Doe* d. *Thompson* v. *Thompson* (*d*). Then if *Lee* had been called, the defendants might have shewed their title. *Doe* v. *Wilde* (*a*) is a case where the real tenant of the premises was not allowed to prove that he was so, because the verdict for the plaintiff would have turned him out of possession, but *Lee* being only a servant to the defendants, loss of the possession would have been immaterial to him. [*Coleridge* J. How can they contend that he was their servant, after having entered into the consent rule, where they state themselves to be his landlords?] That is

(*a*) 5 Taunt. 183.
(*b*) 6 Bing. 394.
(*c*) 1 N. & P. 215; *S. C.* 5 A. & E. 532.
(*d*) 6 A. & E. 721; *S. C.* 2 N. & P. 657.

a mere fiction, like all the proceedings in ejectment, for the more convenient trial of the real merits of the case. The landlord's rule enables the landlord to come in and defend as the real defendant, and it is only a form that the party in possession, who may be his servant, is called the tenant. Both *Hammond* and *Lee* were in possession by the sufferance of the defendants; the principle, therefore, laid down by *Tindal* C. J., in *Doe* v. *Tyler* (*a*), does not apply, because *Lee* had no more interest in the premises than any other domestic servant.

Lord Denman C. J.—The argument raised on the late statute is inapplicable. By the 3 & 4 *Will.* 4, c. 27, an adverse possession of twenty years may be relied upon even against the real owners of the land; but here the defendants are mere strangers, and the question is, whether the lessor of the plaintiff has made out any title at all. I think he has, by shewing *Hammond* to have been in possession of the premises, and that *Lee* came in under *Hammond*. Whether he came in as tenant or servant is immaterial, for it was not competent to him to dispute *Hammond*'s title or *Willis*'s, who stands in *Hammond*'s place. The plaintiff therefore has shewn a primâ facie case, but it is said an answer would have been given to it if the evidence of *Lee* had been admitted, and that he was competent, as he was only a servant of the defendants. But what do the defendants come in to defend under the consent rule?—the possession of *Lee*. It is not therefore for them to say that the possession is not *Lee*'s. That being so, the effect of a verdict for the plaintiff would be to turn *Lee* out of his possession.

Littledale J.—In this case it appears that from 1808 to 1821 *Willis* and *Hammond* occupied several parts of this house, not as tenants, but as servants, and that a year or two before his death, *Hammond* takes in *Lee* to live with

(*a*) 6 Bing. 394.

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him, and take care of him during his illness, and that he afterwards dies and leaves his interest in the premises to *Willis*. Now supposing that *Hammond* instead of dying had recovered, and left the premises with *Lee* in possession of them, and on his return *Lee* had refused to give up possession, it is clear that *Hammond* could have recovered them from him by an ejectment. But *Willis* stands in the same position as *Hammond*, therefore, as against *Willis*, *Lee* cannot dispute his title, and the question as to the twenty years' possession does not arise. But then it is contended that *Lee* is a competent witness, because he disclaims possessing as tenant, and that, as he is only a servant, it is immaterial to him whether he is turned out of possession or not. But the defendants have treated him as tenant in possession, and, though the point is not quite free from doubt, on the whole I think he was an incompetent witness.

WILLIAMS J.—The question turns entirely on the facts of the case, and not at all on the late statute. Suppose the ejectment had been between *Lee* and *Hammond*, could the title of the latter have been disputed? Then on what ground can the defendants defend the possession of *Lee*, except as his landlords? He clearly must be considered, with reference to the facts of the case, as tenant in possession, and therefore had a direct interest in the suit.

COLERIDGE J.—It is clear that *Hammond* could have maintained ejectment against *Lee*, on the privity of contract between them, and the question is, where *Hammond* devises to *Willis*, and the latter brings ejectment, whether *Lee* could then set up the title of any one else. If he could, this consequence follows, that, if a party leaves a servant in possession of a house, who afterwards refuses to deliver it up, on ejectment brought the owner may be called upon to go into the whole evidence of his title. This is so monstrous, that it clearly cannot be so. But it is said the

lefendants are entitled to prove their title under the land-ord's rule. That dates from the 11 *Geo.* 2, c. 19, s. 13, vhich was passed for the purpose of preventing tenants rom allowing recoveries to be obtained fraudulently against heir landlords, and was framed merely to enable landlords o come in and defend. But I agree that the act has been xtended to others, claiming title to the lands, such as the ieir, the mortgagee, or the remainder-man (*a*), but in all hose cases there is a privity between such parties and the occupier, and whenever it has been attempted to bring in under the landlord's rule parties like the defendants, whose title is inconsistent with the possession of the occupier, and would throw a different onus of proof on the plaintiff, it has been objected to; and where it has been allowed, as in *Doe* v. *Lady Smythe* (*b*), the Court would not allow the defendant to set up a different title from that of the tenant in possession, for otherwise a perfect stranger to the tenant might come in and put himself into the favourable position of a tenant in possession, which was never intended. Then as to the competence of *Lee*, the effect of the landlord's rule is to let another person in to defend the possession of the tenant as lawful; if the plaintiff succeeds he turns *Lee* out of possession, *Lee* therefore is an incompetent witness. It is suggested, indeed, that *Lee* is only a servant, but, if that fact had been brought before the Court, there would not have been a proper service of the declaration in the action, for although a servant may be served, in such case it is service upon the master. No such objection however was made.

Rule discharged.

(*a*) See the instances collected, 2 Tidd's Pr. 1228, (9th ed.).

(*b*) 4 Mau. & S. 348.

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DOE *d.* CHADBORN *v.* GREEN.

Tuesday, January 29th.

A lease for one year, and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year.

EJECTMENT for a cottage at Winchcombe, in the county of Gloucester. At the trial before *Parke* B. at the Gloucestershire spring assizes, it appeared that the lessor of the plaintiff had demised the premises to the defendant by an agreement dated January 5, 1836, by which *Chadborn* agreed to let, and *Green* agreed to take, "for one year from the date hereof, and so on from year to year until the tenancy hereby created shall be determined, as after mentioned," the cottage particularly described in the agreement, "at the yearly rent of 10*l.* a year, to be paid quarterly." "And it is further agreed between the said parties, that it shall be lawful for the said *J. Chadborn* or the said *W. Green* to determine the tenancy, by either of us giving unto the other three months' notice of either of their intentions." The lessor of the plaintiff gave the defendant three months' notice, to quit at the end of the first year. The defendant contended that, as the above agreement constituted a tenancy for two years, a notice to quit at the end of the first year could not be given, and he cited *Birch* v. *Wright* (*a*). The learned baron, however, thought that it was a demise capable of being terminated at the end of the first year, on the authority of *Thompson* v. *Maberley* (*b*), and he directed a verdict to be entered for the plaintiff.

Talfourd Serjt. having obtained a rule nisi for a new trial, in Easter term, 1837, on the ground of misdirection,

W. J. Alexander now shewed cause. The learned judge was quite right in his direction. In *Thompson* v. *Maberley* (*b*) the terms of the agreement were "for twelve months certain, and six months' notice afterwards;" and Lord *Ellenborough* held, that notice to quit at the end of the first year might be given. In *Kemp* v. *Derrett* (*c*), where the

(*a*) 1 T. R. 378.
(*b*) 2 Camp. 573.
(*c*) 3 Camp. 510.

agreement was that the tenant should "always be subject to quit at three months' notice," it was held to be a three months' holding, and that a three months' notice to quit at the end of any quarter from the time of entry would be sufficient. So in *Doe* v. *Donovan* (*a*), where a house was let from Michaelmas at 50*l.* a year, to quit at a quarter's notice, *Chambre* J. said, "that the meaning of the quarter's notice depended upon the whole contract; if it was a tenancy from year to year, with a quarter's warning, it would be a quarter ending with the year; but if it were a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice, it would be a quarter ending at any time." [*Coleridge* J. Does not this case fall within the prior part of the alternative?] That is the question. *Birch* v. *Wright* (*b*), which was cited at the trial, is not very applicable. What *Buller* J. said in that case as to a holding of this sort was an *obiter dictum*. This case must be decided upon the agreement itself, and that shews that an absolute tenancy for one year only was created, which was therefore capable of being put an end to at the close of the first year.

Talfourd Serjt. contrà. The argument for the plaintiff proves too much, for, if the tenancy created was defeasible by a three months' notice before the end of the two years, it must have been so at the end of any quarter in the first year. But *Denn* v. *Cartwright* (*c*) clearly shews that a tenancy from year to year enures as a tenancy for two years at least, and entirely confirms *Birch* v. *Wright* (*b*). *Thompson* v. *Maberley* (*d*) at first sight appears difficult to understand, but on examining Lord *Ellenborough*'s judgment it will be found that he decided the case on the introduction of the word "certain," and that, as the agreement was for twelve

(*a*) 1 Taunt. 555; *S. C.* 2 Camp. 78.
(*b*) 1 T. R. 378.
(*c*) 4 East, 31.
(*d*) 2 Camp. 573.

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months certain, every thing after that period was uncertain and dependent on the notice.

Cur. adv. vult.

Lord DENMAN C.J. on this day delivered the judgment of the Court.—The decision in this case turned upon the sufficiency of the notice to quit. My brother *Parke*, before whom it was tried, thought that the agreement constituted a tenancy for one year certain only, and relied on *Thompson* v. *Maberley* (*a*). But we think that case is clearly distinguishable, as the terms of the agreement there, by stating the holding to be for *twelve months certain*, and six months' notice afterwards, limited all that was definitively agreed on between the parties to the first twelve months. In this case the agreement was for one year, and so on from year to year, which in conformity with *Birch* v. *Wright* (*b*), and other cases (*c*), we think constitutes a tenancy for two years certain, and therefore the notice to quit at the end of the first was insufficient.

Rule absolute.

(*a*) 2 Camp. 573.
(*b*) 1 T. R. 378.
(*c*) See the authorities collected in 4 Bac. Abr. 7th ed. 838-9, Leases and Terms for Years (L); and Sir H. Gwillim's observations on the case of *Harris* v. *Evans*, 1 Wils. 262; *S.C.* Ambl. 329.

Tuesday, January 29th.

The QUEEN *v.* CODD.

Where a justice is called upon to enforce an order of filiation under 49 *Geo.* 3, c. 68, s. 3, on proof of the weekly sum ordered to be paid being due to the parish, and of the reputed father's refusal to pay, he has no jurisdiction to inquire how the weekly sum is expended: and therefore where a justice refused to commit such father to the house of correction, on the ground that the weekly sum expended by the parish officers was not wholly employed in the support of the bastard child, the Court of Q. B. issued a mandamus to the justice to compel him to make the committal.

PLATT, in Hilary term last, had obtained a rule, calling upon the defendant to shew cause why a writ of mandamus should not issue to him, commanding him to issue his warrant to apprehend and commit *James Woodard*, the person

named in a certain order of justices, to the house of correction, to be there kept to hard labour for three calendar months, unless before the expiration of that time he paid to the overseers of St. John, at Hackney, the sum of 15*l.* 1*s.*, due from him under the above order.

By the affidavits on which the rule was obtained, it appeared that on 21st May, 1834, an order of justices had been made on *Woodard* for the payment of 7*s.* per week to the parish officers of St. John, Hackney, as the putative father of a bastard child, born of *Elizabeth Beckett.* The order was inrolled of record, and no appeal was made against it. *Woodard* paid from time to time to the said parish officers several sums of money due under the order, but the sum of 15*l.* 1*s.* being due to the parish officers for the sums advanced to *Elizabeth Beckett,* on the 30th October, 1837, they brought *Woodard* before the defendant, as the sitting justice at Worship Street, and on proof of the order and the defendant's refusal to pay, they required the defendant to commit *Woodard,* under the statute (*a*), for three months. The defendant refused to do so, but said he would order *Woodard* to pay such sum of money, or commit him for the non-payment, if the guardians of the Hackney Union (to which St. John's, Hackney, belongs) would take in the said bastard child, and, after charging for the maintenance of the child, would place the remainder of the 7*s.* per week in a savings' bank, for the benefit of the child. *Elizabeth Beckett* refused to give up the child, and the guardians of the Union having also declined to take it, the defendant refused to commit *Woodard.*

The affidavit in answer stated, that at the hearing before the defendant *Woodard* objected that 7*s.* a week was an excessive sum for the support of the bastard child, and that *Elizabeth Beckett* had another bastard child, of which *Woodard* was not the reputed father, and that she expended the sum of 7*s.* per week indiscriminately in support of both

(*a*) 49 *Geo.* 3, c. 68, s. 3.

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children. The defendant thought that these payments were not applied according to the acts of parliament for the relief of the poor, and recommended the guardians of the Hackney Union to take the bastard child, of which *Woodard* was the father, into the workhouse, to be virtuously brought up; and two other magistrates, sitting at the same time, concurred in opinion with the defendant. The guardians having declined to act upon this recommendation, the defendant went fully into the case, and on calling upon *Woodard* for his defence, he alleged that the money demanded of him was not expended in the support of the bastard child of which he was the father. The defendant thereupon required the parish officers to prove how the money was expended; and they proved that the sum of 7*s.* per week was paid over to *Elizabeth Beckett*, but without requiring from her any account of its disposal. It then appeared, by the evidence of *Beckett*, that she expended it in support of both her children. The defendant was thereupon of opinion that the whole of the 7*s.* not being expended upon the child of *Woodard*, this was a reasonable cause, under the statute, for refusing to make an order for the payment of 15*l.* 1*s.*

Erle now shewed cause. This application was made to the defendant under the 49 *Geo.* 3, c. 68, s. 3, which directs the justices, on proof of an order of filiation, and of a refusal to pay the amount due under the order, to commit the reputed father to the house of correction for three months, unless the reputed father "shall shew to such justice some reasonable and sufficient cause" for not paying the amount claimed. What is a reasonable and sufficient cause, must be left to the discretion of the justice. The defendant in the present case thought *bonâ fide* that a sufficient cause was alleged. The principle of the poor laws is, that the sum mentioned in the order shall not exceed the "actual expense to be incurred" for the bastard child, as appears by the 4 & 5 *Will.* 4, c. 76, s. 72: and although that statute applies to subsequent orders only, the 18 *Eliz.* c. 3, which

gives justices their jurisdiction over the reputed fathers of bastard children, is framed on the same principle; for it enacts that they may, at their discretion, "take order for the keeping of every such bastard child," by charging such reputed father with the payment of money weekly, or other sustentation for the relief of such child. The defendant contends upon those statutes, that, although an order may be made in the usual form for a sum of money to be paid weekly for the relief of a bastard child, if it appears that such weekly sum is not so expended, the justice is not bound to enforce the order, and imprison the reputed father.

Platt, contrà, was not called upon by the Court.

Lord DENMAN C. J.—No reasonable doubt can be entertained on this case. The justices, under the 49 *Geo.* 3, c. 68, were bound to make an order on the reputed father of a bastard child chargeable to the parish, and sect. 4 of that statute left the amount of charge entirely at their discretion. If the order was excessive, *Woodard* might have appealed. I remember no case where the justice, who has been called on to enforce such an order, has inquired whether the whole sum was expended on the bastard child. Perhaps some authority to the justice in that respect might be desirable, but he has none such given him by the act.

LITTLEDALE J.—As long as the original order is in force, the defendant was bound to carry it into execution.

WILLIAMS J. concurred.

COLERIDGE J.—If we were to refuse this rule, we should in effect permit appeals to be made from the original order, in a mode and at a time different from those pointed out by the act (*a*).

Rule absolute.

(*a*) Section 2.

1839.

Tuesday, January 29th.

Where a cause was referred by order of nisi prius, with power to the arbitrator to certify whether the cause was a proper one to be tried before a judge, and the arbitrator certified to that effect, but the judge died before the arbitrator's certificate was made known to him:—Held, that the full Court had no power to make the order for full costs.

ASTLEY *v.* JOY.

AT the trial of this cause before *Park* J. at the last Norwich assizes, the cause was referred to a barrister, with the power to enter a certificate whether the cause was a proper one to be tried before a judge. The arbitrator found a verdict for the plaintiff for 16*l.* 11*s.* 10*d.*, and certified "that the above cause was one to be tried before a judge of assize." On the plaintiff's attorney applying at the chambers of the above learned judge, in order to obtain his certificate, his lordship was prevented from seeing the attorney by illness, which terminated fatally.

Byles now moved the Court, on an affidavit stating the above facts, for a direction to the Master to tax the full costs, on the authority of *Nokes* v. *Frazer* (*a*).

Lord DENMAN C. J.—That case does not warrant us in acceding to this motion. There the learned judge, who saw the pleadings, thought it a proper case to be tried by a judge of assize; but in this case there has been no exercise of the opinion of a judge, but of the arbitrator only. If we were to permit this application, we should have attempts made to obtain similar rules, without reference to the judge's order at all.

LITTLEDALE, WILLIAMS and COLERIDGE, Js. concurred.

Rule refused.

(*a*) 3 Dowl. P. C. 339.

1839.

In the matter of Arbitration between GREENWOOD and J. TITTERINGTON and another.

Tuesday, January 29th.

Where an umpire in an arbitration is chosen by lot, the assent of the parties to the umpire chosen does not make the election good, unless they know the mode in which the umpire was chosen, and all the circumstances relating to his election.

CRESSWELL had obtained a rule calling upon *J.* and *A. Titterington* to shew cause why the award in this case should not be set aside, on the ground of the umpire having been improperly appointed, and on other grounds, which it is unnecessary to mention.

The affidavits, on which the rule was obtained, stated that, by articles of agreement between the two parties, an action pending, and all matters of difference between them, were referred to two arbitrators therein named, with the usual power to appoint an umpire. At the first meeting of the arbitrators, each nominated a different party as umpire, and of the two named one was chosen umpire by ballot.

The affidavits in answer stated that the arbitrators informed both parties, previous to the commencement of the business at the first meeting, that they had mutually chosen one *Atkinson* to be an umpire, and that the parties gave consent and approved of the choice so made.

Alexander now shewed cause. With regard to choosing an umpire by lot, there are three recent decisions, which leave the law rather doubtful on the point. In *Ford* v. *Jones* (*a*) it was held, that an appointment of an umpire must in no case be determined by chance, even although the parties consent; but *In the matter of Tunno* (*b*) it was held that, if a party consents to an umpire being so elected, he waives all objection. Then again, *In the matter of Jamieson* (*c*), it was held that, where the umpire was chosen by lot, and the parties acquiesced in the appointment, still that did not cure the irregularity, unless the parties were acquainted with all the circumstances attending the mode

(*a*) 3 B. & Ad. 248.
(*b*) 5 B. & Ad. 488; S. C. 2 N. & M. 328.
(*c*) 4 A. & E. 945.

1839.

In re GREENWOOD and TITTERINGTON.

of election. But there one of the arbitrators objected to the party eventually chosen as umpire; and that fact was not made known to the party objecting to the award. Here the parties consented to the appointment made, and it does not appear that any objection was made to either of the parties nominated as umpire. The principle, therefore, on which an election by lot is generally bad, does not present itself, for both parties assented to the party chosen as a fit and proper umpire. [He was then proceeding to answer other objections, but was stopped by the Court.]

Lord DENMAN C. J.—As we think you have not got over the first objection, it will be unnecessary to discuss the others. The presumption is always strong against an election by lot, because a party is entitled to have his case decided by an umpire in whom he has confidence, and he should therefore be able to express his opinion as to every party proposed. I also think that a party submitting to a reference ought to know the mode in which the umpire is chosen. Neither of these two circumstances appears in the present case; and therefore I think the award is bad.

LITTLEDALE J.—In a case lately before me in the Bail Court, where the umpire was chosen by lot, I examined all the cases, and came to the conclusion that the selection of an umpire should always be matter of choice and not of chance. In that case the consent to choose by lot was given by the attornies' clerks who appeared for the parties at the reference, but I thought they were not competent to give their consent.

WILLIAMS J.—The consent given by the parties in this case was not at all a consent as to the mode in which the umpire was chosen, but only as to the party chosen. Now, for aught that appears, that consent may have been given in complete ignorance that there existed weighty objections to the party so elected.

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COLERIDGE J.—It must be conceded that the election of an umpire by ballot is bad *per se*, and can only be supported where the parties have consented. But the consent of the parties must be to all the circumstances attending the election. The only fact here as to the consent is, that the parties approved of the party elected; but that may very well have been, on the supposition that the party so chosen was agreed upon by both arbitrators. In the case of *In the matter of Tunno* (*a*) it was clear that the party who moved to set aside the award was cognizant of the mode in which the umpire was elected; and it was properly held that his acquiescence, with full knowledge of the facts, made the election good.

Rule absolute.

(*a*) 5 B. & Ad. 488; *S. C.* 2 N. & M. 328.

SYKES *v.* DIXON.

Tuesday, January 29th.

CASE. The first count of the declaration stated that one *William Bradley* heretofore, to wit, on &c., then and still being the servant of the plaintiff in his trade and business of a manufacturer of powder flasks, wrongfully and without the licence or consent, &c. of the plaintiff, departed and went away from and out of the service of the plaintiff, and afterwards went and came to the defendant; yet the defendant, well knowing the said *W. Bradley* to be the servant of the plaintiff in his said trade and business, but contriving &c., unlawfully &c. received the said *W. B.*, so then being the servant of the plaintiff as aforesaid, into the service of him the defendant, and harboured, detained and kept the said *W. B.* in the service of him the defendant,

B., by a memorandum of agreement signed by himself only, agreed to work for the plaintiff, "manufacturer of powder flasks, and for no other person whatsoever, from the 17th Aug. 1833, during and until the expiration of twelve months, and so on from twelve months' end to twelve months, and until I shall give *J. S.* (plaintiff) twelve months' notice in writing to quit:"—Held, that, as this agreement contained nothing binding on the plaintiff, it was *nudum pactum*, and therefore although *B.* served under the agreement till April, 1836, when he left the service and worked for the defendant, who was shewn the agreement in question, and warned that *B.* was the plaintiff's hired servant, that in an action against defendant for harbouring the plaintiff's servant, it was competent to the defendant to shew that the contract of hiring was altogether void.

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for a long space of time, to wit, until &c. The second count was for enticing the said *W. Bradley* to depart from the service of the plaintiff. Pleas: 1, Not guilty: 2, That the said *W. Bradley* was not, at the said times when &c., the servant of the said plaintiff modo et formâ, &c.

At the trial before *Alderson* B., at the Yorkshire spring assizes, 1837, it appeared that the plaintiff and defendant were powder flask manufacturers at Sheffield, and that *W. Bradley*, who had served an apprenticeship with the plaintiff, when his articles were out, had entered into the following agreement with the plaintiff:

"Memorandum of agreement made this 17th day of August, 1833, by which I, *William Bradley*, of Sheffield, in the county of York, do agree that I will work for and with *John Sykes*, of Sheffield aforesaid, manufacturer of powder flasks and other articles, at and in such work as he shall order and direct, and no other person whatsoever, from this date henceforth, during and until the expiration of twelve months, and so on from twelve months end to twelve months, and until I shall give the said *John Sykes* twelve months' notice in writing that I shall quit his service.

"*William* his + mark *Bradley.*"

Bradley worked under this agreement till the 27th August, 1835, when he gave the plaintiff a month's notice to quit, in writing. The plaintiff thereupon told him that a year's notice to quit was necessary; upon which he gave him notice by parol to quit that day twelve months. *Bradley* continued to work for the plaintiff till April, 1836, when he absented himself from his work for three or four days, and got some work at the defendant's, whom he told that his service with the plaintiff expired in the August following. The plaintiff gave the defendant a written notice that *Bradley* was his hired servant under the agreement of 17th August, 1833, and that if defendant employed him he would bring an action against him. *Bradley* thereupon returned to his work at the plaintiff's, where he continued till August 27th, 1836, when he again left, and got employed at the defendant's. The plaintiff, on September 2nd, again gave the defendant notice that

Bradley was his servant, and gave him a copy of the agreement. *Bradley* continued with the defendant till October 4th following, and then returned to work at the plaintiff's. On these facts the counsel for the defendant contended, that as the agreement of 17th August, 1833, was unilateral, there being no consideration for the promise of *Bradley*, it was not binding; and he cited *Lees* v. *Whitcombe* (*a*), *Wain* v. *Warlters* (*b*), and submitted that the plaintiff should be nonsuited. The learned baron thought that, whether the agreement was binding or not between *Bradley* and the plaintiff, the defendant could not take advantage of any defect in it, as appeared by *Barber* v. *Dennis* (*c*) and *Keane* v. *Boycott* (*d*); and his lordship left it to the jury that, although *Bradley* might have deceived the defendant by stating that his service with the plaintiff had expired, the defendant had taken upon himself to prove that he was not the plaintiff's servant, and that it was immaterial whether he knew that fact or not, for as he had read the agreement, he was bound by its legal effect; and therefore on the first count there must be a verdict for the plaintiff. The jury accordingly found a verdict for the plaintiff, with 30*s*. damages, on the first count, and for the defendant on the second; and his lordship gave the defendant leave to enter a nonsuit.

Baines having obtained a rule nisi accordingly, in the ensuing Easter term (April 20th),

Cresswell and *Hoggins* shewed cause on a former day in this term (*e*). It will be contended that this agreement comes within the 4th section of the Statute of Frauds, being a contract not to be performed within a year, and that therefore, as the consideration does not appear, it comes within *Wain* v. *Warlters* (*b*). To make out the contract to be such an agreement, the cases of a demise from year to year, which

(*a*) 5 Bing. 34.
(*b*) 5 East, 10.
(*c*) 1 Salk. 68.
(*d*) 2 H. Bl. 511.
(*e*) January 22nd, before Lord *Denman* C.J., *Littledale* and *Williams*, Js. *Coleridge* J. was sitting in the Bail Court.

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have been held to be a demise for two years, will be relied upon; but admitting that to be so, and that this agreement contained a contract to serve for two years, that period terminated on 17th August, 1835, and if the parties went on afterwards, a new contract arose for a year upon the terms of the old agreement. It is true that that new contract might last for more than a year; but that is not sufficient to bring it within the Statute of Frauds, unless it was the intention of the parties that it should last more than a year: *Boydell* v. *Drummond* (*a*). It is then objected, on the authority of *Lees* v. *Whitcombe* (*b*), that the agreement is bad for want of mutuality. But it is not necessary, under the Statute of Frauds, that the agreement should be signed by both parties, but only by the party to be charged; *Laythoarp* v. *Bryant* (*c*). That case disposes of the point as to the want of mutuality, and shews that *Lees* v. *Whitcombe* (*b*) can hardly be supported. There the agreement by the defendant was to remain with the plaintiff for two years *for the purpose of learning the business* of a dressmaker; and one count alleged the consideration to be, that the plaintiff would receive the defendant into his service, and instruct her in the business of a dressmaker and milliner; and the other count simply that he would receive her into his service, and alleged a promise by the defendant to serve; *Best* C. J. decided the case on the ground of variance; *Burrough* J. thought that there was no consideration expressed; and *Gaselee* J. was inclined to differ from both judges. The case therefore cannot be relied on as an authority. But what need can there be for a consideration to be expressed on the face of the agreement, as it must be implied by law that *Bradley* was to receive wages for his services; especially in the view taken of the instrument, that it is not the actual contract between the parties, but only contains the terms on which the implied contract was framed. If that be so, a yearly hiring existed, and the

(*a*) 11 East, 142.
(*b*) 5 Bing. 34.
(*c*) 2 Bing. N. C. 735.

notice to quit, to be valid, must terminate at the close of the current year: *Beeston* v. *Collier* (*a*), *Williams* v. *Byrne* (*b*). It is therefore unnecessary to rely on *Barber* v. *Dennis* (*c*) and *Keane* v. *Boycott* (*d*). Those cases, however, establish clearly that, whether the contract of hiring between *Bradley* and the plaintiff was void or not, the defendant could not take advantage of it.

Baines and *Ogle*, contrà. It is clear that this agreement was void within the 4th sect. of the Statute of Frauds; and if so, *Bradley* was not the *hired* servant of the plaintiff. The authorities which shew that an agreement of this kind operates as an agreement for two years, are collected in the judgment of *Buller* J. in *Birch* v. *Wright* (*e*), *Bac.* Abr. 7th ed. 838-9, Leases (L), and *Denn* v. *Cartwright* (*f*). That being so, it comes within the 4th sect. of the Statute of Frauds, and the consideration ought to be expressed. But it is said that although the agreement may have operated as a contract for two years, that term expired in August, 1835; but if the agreement was invalid ab initio, it cannot be referred to at all for any of the terms it contains. Supposing even that it had been a valid contract for two years' continuance in the service,—at the expiration of that time would it necessarily create a yearly service upon the old terms, unless some further act was done, such as the payment of rent? But the contract, having no consideration expressed upon it, was altogether void, as appears by *Carrington* v. *Roots* (*g*), where a distinction was endeavoured to be drawn between agreements invalid under the 4th sect. and the 17th sect. of the Statute of Frauds; but the Court held that they were both equally void. The agreement is also bad as a restraint upon trade, for no adequate consideration appears to support it, which is absolutely

(*a*) 4 Bing. 309.
(*b*) 2 N. & P. 139.
(*c*) 1 Salk. 68.
(*d*) 2 H. Bl. 511.
(*e*) 1 T. R. 380.
(*f*) 4 East, 31.
(*g*) 2 M. & W. 248.

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necessary; *Young* v. *Timmins* (*a*); even supposing that the implied liability of the plaintiff to pay wages could be taken into account. [Lord *Denman* C.J. I do not see how the consideration can be implied, because he would have been entitled to wages whoever he worked for.] The contract therefore is void altogether, which distinguishes it from *Keane* v. *Boycott* (*b*), where the contract was voidable only, and the case was decided expressly on that ground. Any party therefore may take advantage of the defect, as has been decided by several sessions cases; *Rex* v. *Hipswell* (*c*), *Rex* v. *Gravesend* (*d*), *Gye* v. *Felton* (*e*), which last case is precisely in point with the present case. Even if the contract was only voidable, *Bradley* exercised his option, and put an end to it.

Cur. adv. vult.

Lord DENMAN C.J. on this day delivered the judgment of the Court.—The issue at the trial in this case was, whether *William Bradley* was the servant of the plaintiff. In order to prove that fact, the agreement of the 17th of August, 1833, was put in; but that appeared to be upon one side only, although it undoubtedly constituted a yearly contract of hiring, if valid, and it stipulated for twelve months' notice in writing to quit the plaintiff's service.

Bradley, in 1836, gave a month's notice in writing, and on being informed by the plaintiff that a year's notice was necessary, he gave a parol notice to that effect. On these facts we are to say whether any valid contract of service existed between the parties. We think there did not, for the engagement is all on one side, and no reciprocal benefit was secured to *Bradley*. The answer made at the bar was, that a consideration moving from the plaintiff would result at law from the work and labour done by *Bradley*, as the plaintiff would be under the obligation of paying for

(*a*) 1 C. & J. 331.
(*b*) 2 H. Bl. 511.
(*c*) 8 B. & C. 466; *S. C.* 2 Mann. & R. 474.
(*d*) 3 B. & Ad. 240. See also *Rex* v. *Barmston*, 3 N. & P. 167.
(*e*) 4 Taunt. 876.

1839.

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such services; but so he would for any services whatever. Therefore that argument fails. But then it is said, on the authority of *Keane* v. *Boycott* (*a*), that even if the contract of hiring be invalid, no third party can take advantage of the defect. If an actual service existed between the plaintiff and *Bradley*, we should think this answer a good one; but as we are of opinion that the service was put an end to by the departure of *Bradley*, we think that it was competent to the defendant to rely upon the objection he has raised.

Rule absolute.

(*a*) 2 H. Bl. 511.

The QUEEN *v.* The Recorder of BATH.

Wednesday, January 30th.

Overseers of a parish, on a parochial appeal, are not competent witnesses.

A Rule, on a former day in this term, had been obtained, calling upon the defendant to shew cause why a mandamus should not issue, directed to him, commanding him to cause continuances, to the next quarter sessions for the city and borough of Bath, to be entered upon an appeal against an order of removal, and to hear and determine the merits of the said appeal.

By the affidavits it appeared that on the appeal being called on, which was between two parishes of the city of Bath, an overseer of the appellant parish was called to prove the notice of appeal, when objection was taken that the recorder of a borough had no jurisdiction to try a settlement appeal; and secondly, that an overseer was not a competent witness: the recorder being of opinion that he had no jurisdiction, acceded to the objection and dismissed the appeal.

Kinglake shewed cause (*b*). I. On an appeal, the overseers of the parish are parties to the record; and therefore they fall within the principle of those cases which make such parties incompetent witnesses: *Bauerman* v. *Radenius* (*c*).

(*b*) Jan. 29, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(*c*) 7 T. R. 664.

1839.

The QUEEN v. The Recorder of BATH.

Besides which, by 4 & 5 *Will.* 4, c. 76, s. 82, the overseers of the parish, on a parochial appeal, are made expressly liable to such costs as the Court may direct, to be recovered by distress. It is true those costs may be afterwards, perhaps, recovered from the parish; but liability to costs in the first instance disqualifies a witness: 1 *Stark.* Ev. 196. Overseers being incompetent on these grounds, their competency is not established by 54 *Geo.* 3, c. 170, s. 9, which enacts that no inhabitant or person rated in any parish, or executing or holding any office thereof or therein, shall be deemed on *such account* an incompetent witness against any such parish, in any matter relating to the settlement of a pauper in such parish, &c. Before that statute all the inhabitants of the parish were incompetent on a parish appeal, because they were the real parties in the appeal: *Rex* v. *Kirdford* (*a*), *Rex* v. *Woburn* (*b*), *Rex* v. *Hardwicke* (*c*). But as overseers were not incompetent before that statute by virtue of their office, the statute has not affected their competency in that respect; and if they, by virtue of their office, bring an appeal, and so make themselves liable to costs, their incompetency at common law attaches: *Heudebourck* v. *Langton* (*d*), *Rex* v. *Governors of Mary Magdalen* (*e*).

II. The next point is, whether the recorder of a borough has jurisdiction to try sessions' appeals. [Lord *Denman* C. J. We will hear the other side on this first point.]

Shee, contrà. The invariable practice, since the 54 *Geo.* 3, c. 170, has been to call overseers as witnesses in parish appeals. The words "holding any office therein," in sect. 9 of that act, must have been introduced expressly for the purpose of meeting the case of overseers. Sect. 82 of the New Poor Law Act (4 & 5 *Will.* 4, c. 76) introduces no new liability on the part of overseers; for the costs they are directed to pay there, are to come from the public funds

(*a*) 2 East, 561.
(*b*) 10 East, 395.
(*c*) 11 East, 579.
(*d*) 1 Mood. & M. 402; *S.C.* 3 C. & P. 566.
(*e*) 3 East, 7.

of the parish, and it is only in case of perverseness on their part that they can be subject to a distress. In *M'Gahey* v. *Alston* (*a*), which was an action on a bond, by the vestry-clerk of St. Pancras, one of the directors of the vestry was held to be a competent witness, on the authority of *Fletcher* v. *Greenwell* (*b*). In *Mann.* Dig. Witness C (n), the decisions are collected in which trustees have been held competent to give evidence, although parties to the suit.

Lord DENMAN C. J.—The impression on my mind is, that these preliminary matters may be proved by the parties nominally interested. We will, however, look into the late act.

Cur. adv. vult.

Lord DENMAN C. J. on this day said—The question is, whether the Recorder of Bath did right in rejecting the evidence of an overseer, who was called to prove the notice of appeal; and we are of opinion that the recorder did perfectly right in rejecting him, for none of the statutes make him competent. I had some doubts whether he might not be competent to prove a notice, as in this Court we frequently admit affidavits from parties on preliminary matters; but on reflection we are of opinion that no distinction of that sort can prevail.

Rule discharged.

(*a*) 2 M. & W. 206. (*b*) 1 C. M. & R. 754.

1839.

Thursday, January 31st.

A testator seised of an estate pur autre vie to himself and his heirs, by his will, after bequeathing several legacies to his children, but omitting his eldest son, made the following devise: "Also I give, bequeath and devise unto my beloved wife *A. E.* all my money, securities for money, goods, chattels, and estate, and effects, of what nature or kind soever and wheresoever the same may be at the time of my death:"—Held, that the word "estate" conveyed all the testator's interest in his real property, although the lease creating the estate pur autre vie contained a provision against assignment, without the licence in writing of the lessor, and the effect therefore of a devise might be to work a forfeiture.

DOE *d.* THOMAS EVANS *v.* DAVID EVANS and others.

EJECTMENT for lands at Llangwod, in the county of Carmarthen. At the trial at the Carmarthenshire spring assizes, 1837, before *Coleridge* J., it appeared that the land in question consisted of a farm called Monachty, which the lessor of the plaintiff claimed as heir at law of his father, *Daniel Evans*, and the defendant, who was his brother, claimed as devisee of his mother, to whom it was contended that the farm had passed under the will of *Daniel Evans*.

The farm in question had been granted on lease in 1798, to *Daniel Evans* and his heirs, habendum to *Daniel Evans* and his heirs, for and during the lives of two parties therein named. And *Daniel Evans* covenanted that he or his heirs should not, during the said term, sell, alien, assign, or transfer the said indenture of lease, or the premises thereby demised, or any part thereof, or his or their estate, for all or any part of the said term, without the leave or licence in writing of the lessor.

Daniel Evans occupied Monachty during his lifetime, and by his last will, duly executed to pass real property, he gave legacies to several of his children, but not to his eldest son, *Thomas*, and made the following devise to his wife: "Also I give, bequeath, and devise unto my beloved wife, *Ann Evans*, all my money, securities for money, goods, chattels, and *estate*, and effects, of what nature or kind soever and wheresoever the same may or shall be at the time of my death." He also nominated his wife executrix of his will, "subject to my funeral expenses, the above legacies, and all my just debts."

The testator died in February, 1822. His widow took possession of Monachty under the will, and by her will devised it to the defendant for life, with remainders over, subject to certain annuities "to issue out of the said lease." She died in March, 1835.

It was contended for the plaintiff that the freehold did

not pass under the word "estate" in the testator's will. The verdict passed for the plaintiff, with liberty to the defendants to move to enter a verdict for themselves, or a nonsuit. A rule having been obtained accordingly,

J. Evans and *E. V. Williams* shewed cause on a former day in this term (*a*). Although the word "estate" per se is sufficient to pass real estate, yet when it is connected with other words apt for passing personal property only, it is confined to personalty; *Doe* v. *Rout* (*b*), and other cases collected in 2 *Jarm. Pow.* Devises, 160, et sqq.; *Doe* v. *Buckner* (*c*), *Doe* v. *Hurrell* (*d*), *Galliers* v. *Moss* (*e*). In some of the old cases, as in *Wilkinson* v. *Merryland* (*f*), the word *estates* was confined to personalty. [*Littledale* J. That construction would not be adopted now.] The other side will probably rely on *Tilley* v. *Simpson* (*g*), where the words of the devise were, "all the rest and residue of my money, goods, chattels, and estate whatsoever," and the Court held that under the word "estate" the real property passed. But the reasons given by Lord *Hardwicke* C. for the judgment do not seem sound, for his lordship said that as the testator "hath used words comprehending all his personal estate, and then makes use of the word 'estate,' that word will carry the real estate," whereas it is evident that there is scarcely a will in which tautologous words are not used, to which no specific meaning can be given: *Jongsma* v. *Jongsma* (*h*), where a similar decision was arrived at, was decided on the same ground. In most of the cases in which real property has been held to pass under the word *estate*, the will contained a preamble as to the testator's intention to dispose of all his property, but the

(*a*) Jan. 24th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(*b*) 2 Marsh. 397; *S. C.* 7 Taunt. 79.

(*c*) 6 T. R. 610.

(*d*) 5 B. & Ald. 18.

(*e*) 9 B. & C. 267; *S. C.* 4 Mann. & R. 268.

(*f*) Cro. Car. 447.

(*g*) 2 T. R. 659, n.

(*h*) 1 Cox, 362.

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present contains no such clause. The testator therefore probably intended this estate should go to his eldest son, and that was his reason for omitting him in the will. In all these cases the intention of the testator is, as was observed in *Wilce* v. *Wilce* (*a*), the polar star in the construction. *King* v. *Shrives* (*b*) is another case upon the subject, where it appeared that the testator used the word *estate* intentionally to include his real property.

II. Even if *estate* does include the freehold, as there are no words of inheritance, it only gave the widow a life estate. [Lord *Denman* C. J. You will find it difficult to convince us of that.] In *Doe* v. *Robinson* (*c*), where the tenant *pur autre vie* devised to his daughter, without adding words of inheritance, it was held that she took an estate for life only, and it can hardly be contended that the word *close* in that case has in itself any more restricted meaning than the word *estate* here.

III. A devise of this estate would operate as a forfeiture of it, because the lease which creates the estate contains a covenant that the tenant *pur autre vie*, or his heirs, should not sell, alien, assign, or transfer the estate, without the licence in writing of the lessor.

[*John Wilson*, contrà, objected that this point could not be raised, as it was not taken at Nisi Prius, where it might have received an answer. Lord *Denman* C. J. As we are considering the will, and are looking at the creation of the estate, there may be a question whether it does not arise.] The estate is clearly forfeited: it has been assigned by devise without a licence in writing, and therefore would go to neither party. In this view the Court will adopt a construction "ut res magis valeat quam pereat" to avoid such a result. That a devise under such a condition is a forfeiture appears by *Dumpere* v. *Symms* (*d*), where it

(*a*) 7 Bing. 664.
(*b*) 10 Bing. 238.
(*c*) 8 B. & C. 296; *S. C.* 2 Mann. & R. 249.
(*d*) 1 Roll. Abr. 429, pl. 2; *S. C.* 5 Vin. Abr. 155, pl. 2.

was decided "if lessee for years, on condition not to alienate without the assent of the lessor, makes an executor and devises this to him, and the executor enters generally, the testator not being in debt to any one, this is a forfeiture of the condition." The case assumes that there would have been no forfeiture if there had been no specific devise to the executor, and he had taken generally as executor, because then he would have taken it for payment of debts. *Barry* v. *Stanton* (*a*) and *Berry* v. *Taunton* (*b*) are authorities to the same point, and the only decision to the contrary is *Fox* v. *Swann* (*c*), which is loosely reported. It is submitted, therefore, that in order to bear against the forfeiture, the Court will construe this devise to be merely of the personalty, as in *Doe* v. *Clare* (*d*), where the Court held an instrument to be an agreement, and not a lease, because if the latter, it would have worked a forfeiture.

John Wilson, *N. R. Clarke*, and *W. M. James*, contrà. The last point does not properly arise. [Lord *Denman* C. J. It is better to consider the question as to the devise first.] A numerous class of cases shew that the widow in this case took the whole estate of the testator; it is true that the earlier cases gave a more limited effect to the word "estate," but the cases of *Tilley* v. *Simpson* (*e*) and *Jongsma* v. *Jongsma* (*f*), afford the rule which must govern the present case. The question is whether, if this word *estate* were omitted, the other words would not be sufficient to pass all the testator's personal estate. They clearly would, for the words *goods*, *chattels* and *effects*, are each nomen generalissimum sufficient to include all the personalty, as appears by 1 *Roper's* Legacies, 3d ed. 222, 245, 250, at which last passage he cites *Campbell* v. *Prescott* (*g*). This being the rule at law, the cases cited do not militate against it. In *Doe* v. *Rout* (*h*), the devising clause was not

(*a*) Cro. Eliz. 330.
(*b*) Cro. Eliz. 331.
(*c*) Style, 483.
(*d*) 2 T. R. 739.
(*e*) 2 T. R. 659, n.
(*f*) 1 Cox, 362.
(*g*) 15 Ves. 500.
(*h*) 2 Marsh. 397; *S. C.* 7 Taunt. 79.

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nearly so comprehensive as in the present case, and without the residuary clause it would not have sufficed to include all the personal property. Besides, the words relied on there to pass the real estate, viz. "every other *thing*, my property, of what nature or kind soever," appear to point at personal property only. *Doe* v. *Langlands* (*a*), and *Noel* v. *Hoy* (*b*), on the other hand, confirm the rule in *Tilley* v. *Simpson* (*c*). *Edwards* v. *Barnes* (*d*) is one of the last cases upon this point, and it shews the tendency of the current of decisions to give the full effect to general words in a will, unless the contrary intention of the testator distinctly appear, which was the rule laid down by Lord *Eldon* C. in *Woollam* v. *Kenworthy* (*e*). [Lord *Denman* C. J. It is difficult to reconcile the rule laid down in *Tilley* v. *Simpson* (*c*), with the old rule "noscitur à sociis," but we will look into the cases.]

Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—Upon looking into the cases, we are of opinion that the doctrine laid down by Lord *Hardwicke* in *Tilley* v. *Simpson* (*c*), and acted on by *Kenyon* M. R. in *Jongsma* v. *Jongsma* (*f*), and more recently in *Doe* v. *Langlands* (*a*), must prevail. All the other words in the clause but *estate* apply exclusively to personal property, and include every species of it; this word, therefore, must be held to apply to any other property the testator was possessed of.

Rule absolute.

(*a*) 14 East, 370.
(*b*) 5 Madd. 38.
(*c*) 2 T. R. 659, n.
(*d*) 2 Bing. N. C. 252.
(*e*) 9 Ves. 137.
(*f*) 1 Cox, 362.

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Thursday, January 31st.

Where, by rule of a savings' bank, no claim for any sum of money could be made more than seven years from the death of a depositor, the Court discharged a rule nisi for a mandamus to the trustees of such a bank, to appoint an arbitrator, under 9 *Geo.* 4, c. 92, s. 45, to decide a dispute as to money, the alleged depositor of which had been dead more than seven years.

The QUEEN *v.* The Trustees of the NORTHWICH SAVINGS' BANK.

A Rule nisi had been obtained for a mandamus, calling upon the defendants to appoint an arbitrator on their behalf to determine a dispute between them and a depositor named *Lyon*, according to the 9 *Geo.* 4, c. 92, s. 45 (*a*). *Lyon* had been the husband of an alleged depositor, who died in 1826.

J. Evans and *Shee* now shewed cause. Rule 20, passed for the regulation of this Savings' Bank, provides, "That, in case of death, no payment of deposits or interest shall be made but to the legal representative. If no claim or demand be made on the institution for or in respect of any sum or sums of money or interest thereon, before the expiration of the seven years to be completed from the death of any depositor, the money so unclaimed shall be absolutely vested in the trustees and manager, to be by them applied in such manner as is provided by the 11th rule, in the case of the surplus." This rule presents an unanswerable objection to the present application, which is not made until twelve years after the death of the alleged depositor.

Wightman, contrà. The objection may be a very good one; but a dispute has arisen which the statute says is to be decided by arbitration only. This rule must therefore be made absolute; *Rex* v. *The Mildenhall Savings' Bank* (*b*).

(*a*) The Savings' Bank Act, section 45, enacts, that "If any dispute shall arise between any such institution, or any person or persons acting under them, and any individual depositor therein, or any executor, administrator, next of kin, or creditor of any deceased depositor, or any person claiming to be such executor, administrator, next of kin, or creditor, then, and in every such case, the matter so in dispute shall be referred to the arbitration of two indifferent persons, one to be chosen and appointed by the trustees or managers of such institution, and the other by the party with whom the dispute arose."

(*b*) 2 N. & P. 278.

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The QUEEN v. Trustees of the NORTHWICH Savings' Bank.

Lord DENMAN C.J.—The preliminary objection founded on the 20th rule of the society, seems to us to be properly taken, and we cannot interfere to set on foot an inquiry which can lead to no useful result.

LITTLEDALE, WILLIAMS and COLERIDGE, Js. concurred.

Rule absolute.

Thursday, January 24th.

PACK, qui tam &c., *v.* TARPLEY, Clerk.

1. Production of the judgment roll and of the writs of execution issued thereupon, one of which is a writ of sequestrari facias to the bishop, is good evidence that a benefice has been sequestered, although the judgment roll does not contain an award of the latter writ.

2. A sequestration is a charge upon the benefice of a clergyman within the 18 *Geo.* 2, c. 20, and it is immaterial in this respect in what manner the sequestrator has disposed of the rents and profits.

3. Although the incumbent of a benefice is bound to reside and perform the duties in his benefice, notwithstanding his living is sequestered, if the bishop under the sequestration assign him the vicarage house and a stipend for his services, he receives the stipend not in his right as vicar, but under the bishop's licence, and therefore he cannot calculate the stipend as a freehold qualification under 18 *Geo.* 2, c. 20, s. 1.

4. A sequestration is a charge upon all the rents and profits, including the glebe lands, of the benefice, except the parsonage-house, in which the incumbent is bound to reside.

DEBT for a penalty of 100*l.* brought under the 18 *Geo.* 2, c. 20, against the defendant for having acted as a justice of the peace without being duly qualified. Plea: that at the time of the defendant's so acting &c. he had in law, to and for his own use and benefit, in possession, a freehold estate for life in lands, tenements, or hereditaments lying or being in that part of Great Britain called England, of the clear yearly value of 100*l.*, over and above what would satisfy and discharge the incumbrances that affected the same, and over and above all rents and charges payable out of or in respect of the same. Verification.

The cause was tried at Northampton, in 1837, when the verdict passed for the plaintiff, subject to the following case:

Upon the trial of this cause it was proved, that at the time of the defendant acting as a justice of the peace, the vicarage of Floore, in the county of Northampton, of which place the defendant was vicar, was of the annual value of 500*l.*; but that, on the 8th April, 1834, a writ of sequestrari

facias was issued out of the Court of King's Bench to the Bishop of Peterborough against the defendant, for levying the sum of 227*l.* 6*s.* out of the vicarage of Floore. This writ purported to be issued upon the return of the sheriff of Northamptonshire to a writ of fieri facias against the goods of the defendant, in a cause of *Watkins* v. *Tarpley*. The case then set out the writ of sequestrari facias to the Bishop of Peterborough, which recited a writ of fi. fa. to the sheriff of Northamptonshire in a cause of *Watkins* v. *Tarpley*, and the sheriff's return that the defendant had no lay fee in his bailiwick, but that the defendant was a beneficed clerk, that is to say, vicar of Floore, in his county. An examined copy of the fieri facias upon which the writ was issued, with the sheriff's return indorsed, were given in evidence. An examined copy of the judgment roll was also put in evidence by the plaintiff, by which it appeared that there was no entry upon the roll of the sheriff's return, or of the award of the writ of sequestrari facias.

It was objected by the defendant's counsel that under these circumstances the writ of sequestration could not be read in evidence. It was agreed that this objection should make part of the case.

Upon this writ the bishop issued a sequestration, which was published on 13th April, 1834, and possession of the vicarage under it was taken on the next day.

The sequestrator, Mr. *Thomas Scriven*, proved that he had not applied any part of the profits of the living to this sequestration. The sequestrator, since taking possession, had received the rents and profits of the vicarage, not under the aforesaid writ and warrant of sequestration, but under a previous writ and warrant of sequestration against the ecclesiastical goods of the defendant in another cause, which were not given in evidence. The defendant has performed the duties of the vicarage since the sequestration, and has the sum of 120*l.* a year assigned to him by the bishop for so doing out of the proceeds of the vicarage, and has received 60*l.* from the sequestrator for a half year accord-

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ingly. The bishop's licence is in the usual form, and directs the sequestrator to pay the defendant 120*l.* a year for serving the church as stipendiary curate, and assigns to the defendant the vicarage house as a residence. The defendant's counsel contended that the licence was a nullity.

The defendant continues to occupy the vicarage house and grounds, which are proved to be worth above 100*l.* a year. The defendant is 53 years of age.

The actuary of the Clerical Life Insurance Society, called by the defendant, gave evidence as follows. (The evidence was objected to, and it was agreed that the objection should form part of the case.) The value of the defendant's life interest in the vicarage, estimating the living at 470*l.* per annum, the house at 100*l.* per annum, is 5425*l.*, excluding the house is 4638*l.*; the surplus of the first estimate, after deducting the sequestration 2270*l.*, is 3155*l.*; the surplus of the second, after the like deduction, is 2368*l.* For the lowest of these sums the defendant might purchase an annuity of more than 100*l.* a year for his life. It was proved that the sequestration poundage amounted to 22*l.* 10*s.* per annum, being at the rate of 5*l.* per cent. on 450*l.*; that the repairs amounted to 20*l.* per annum, the land tax to 15*l.* If these three sums, taking them as amounting to 50*l.*, were to be deducted, and also the stipend of 120*l.* per annum, from the sum of 470*l.* (the annual value of the living, exclusive of the house,) it would leave a surplus of 300*l.* per annum; the value of the defendant's life interest in that annual surplus is 2960*l.*, which, deducting the sequestration, would leave 690*l.*; which latter sum would not purchase the defendant an annuity of 100*l.* for his life.

The following were the points stated for argument by the defendant:—

1. That under the circumstances stated in the case the writ of sequestration was not admissible in evidence.

2. That, if admissible, when offered it became irrelevant, when it was proved that no part of the profits of defendant's benefice had been taken under it, and that conse-

quently, there being no legal evidence of any other incumbrance, the defendant is entitled to the verdict.

3. That a sequestration is not an incumbrance affecting a benefice, nor a rent or charge payable out of or in respect of it, within the meaning of the statute upon which the present action is founded.

4. That the defendant, notwithstanding the sequestration, retains the right to reside in and occupy the parsonage house and grounds, which gives him a clear interest of above 100*l.* a year.

5. That, independently of the bishop's licence, the defendant has a right, in virtue of his benefice, to perform his ecclesiastical duties, and to receive the salary for so doing, which gives him a clear interest of 120*l.* a year.

6. The defendant contends that, calculating the whole value of his life interest in his benefice, and deducting from it the whole amount of the sequestration, as is done in this case, he is still possessed of an estate for life in land of the clear annual value of 100*l.*

The case was argued at the sittings in banc after Michaelmas term last (*a*) by

Sir *W. W. Follett*, for the plaintiff. The objection made to the defendant's qualification as a justice of the peace is, that he is not in possession of any estate specified in the 18 *Geo.* 2, c. 20, s. 1 (*b*). Assuming that the writ of sequestration has been properly issued and duly published, it is submitted that the defendant has not for his own use and benefit in possession a freehold estate of 100*l.* a year. A sequestration is a continuing charge, and it has been held that the sequestrator ought to continue in possession until the whole debt is satisfied; *Marsh* v. *Fawcett* (*c*). After the sequestration has been published the incumbent cannot maintain ejectment; *Doe* v. *Bluck* (*d*); which decision was confirmed by the Court in banc, and was recog-

(*a*) Monday, Nov. 26th, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(*b*) See the section set out in the judgment of the Court, *post*, p. 489.

(*c*) 2 H. Bl. 582.

(*d*) 3 Camp. 447.

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nized in *Bennett* v. *Apperly* (*a*). The incumbent, therefore, from the time of publishing the sequestration, is a complete stranger to the benefice, although he is entitled to the arrears due up to the time of publication; *Waite* v. *Bishop* (*b*). It is true that the defendant was appointed curate by the bishop, and received a salary for his services, but it is the bishop's duty on a sequestration to provide for the spiritual duties of the benefice, 3 *Burn* Ecc. Law, 341, and he was not at all compelled to select the defendant. The services and salary of the defendant are therefore wholly referable to the bishop's licence. With regard to the first point made, as to the admissibility of the writ of sequestration, *Dampier* J., in *Doe* v. *Bluck* (*c*), held, that the judgment on which the sequestration issued should be produced. The judgment roll was produced in this case, and also the writ of fi. fa. issued in pursuance thereof. The objection is understood to be, that the writ of *sequestrari facias* does not appear to be connected with the judgment roll; but that is an omission which may be supplied at any time, as appears from *Taylor* v. *Gregory* (*d*), where the subject of continuances of writs was much discussed, and also from *Beardmore* v. *Rattenbury* (*e*). As to the sequestration not being a charge on the benefice, the cases on the 13 *Eliz.* c. 20, are strictly analogous. In *Cottle* v. *Warrington* (*f*) the question was made whether a judgment is a charge upon glebe lands; and the distinction clearly is that, although a judgment *per se* is not a charge, if a sequestration issues on the judgment, and a party takes possession, then it is a charge. So on the 13 *Eliz.* c. 20, a warrant of attorney given by a beneficed clergyman is not necessarily a charge; but if the Court sees that it is given with the intention of creating a charge, then it is void under the statute, as creating a charge; *Flight* v. *Salter* (*g*), *Shaw* v. *Pritchard* (*h*). There are

(*a*) 6 B. & C. 630; *S. C.* 9 D. & R. 673.
(*b*) 1 C. M. & R. 507.
(*c*) 3 Camp. 447.
(*d*) 2 B. & Ad. 257.
(*e*) 5 B. & Ald. 452; *S. C.* 1 D. & R. 27.
(*f*) 2 N. & M. 227.
(*g*) 1 B. & Ad. 673.
(*h*) 10 B. & C. 241; *S. C.* 5 Mann. & R. 180.

several other cases also in which a warrant of attorney has been held to be a charge, as under the insolvent acts (*a*). It is therefore apparent either that the defendant is out of possession altogether, or that the sequestration is a charge upon his benefice.

Waddington, contrà. I. It is submitted that the writ of sequestration was not admissible in evidence. The defendant having proved himself *primâ facie* duly qualified, it was incumbent upon the plaintiff in a *qui tam* action to prove strictly his disqualification. The objection is, that it does not appear that the writ of sequestration was connected with the judgment, or that it issued under the authority of the Court, as no entry appears on the judgment roll of the sheriff's return to the writ of fi. fa., or of the award of the writ of levari facias. There is no case directly on the point, but on the writ of elegit, which is a very analogous writ, against the lands of a lay person; it was held in *Ramsbottom* v. *Buckhurst* (*b*), that a copy of the judgment roll containing the award of elegit was sufficient evidence of the elegit; and *Dampier* J. went further, and held that a copy of the elegit itself would not have been such good evidence. It is true that in an action against a sheriff for taking the goods of *A.* under a writ of fi. fa., the production of the writ is a justification, because the sheriff, as a public officer, is therein directed to take the goods of *A.*; but a party who claims an interest under the writ, must, in order to establish his title, produce not only the writ of fi. fa. but also the judgment on which it issued; *Doe* v. *Smith* (*c*). First point.

II. Even if this difficulty were got over, and the writ of sequestration be deemed properly proved, the plaintiff should have gone further, and shewn that the rents and profits of the living were actually taken under it. The writ of sequestration, under which the rents and profits were taken, was not produced, and probably was good for nothing. [*Coleridge* J. Second point.

(*a*) See *Sharpe* v. *Thomas*, 6 Bing. 416.

(*b*) 2 Mau. & S. 565.

(*c*) Holt's N. P. C. 589.

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Did not the defendant take as stipendiary curate under the sequestration?] Not under this sequestration, certainly.—[Sir *W. W. Follett.* It is stated in the case that the defendant has performed the duties of the vicarage since the sequestration, under the bishop's licence. And "the defendant's counsel contended that the licence was a nullity;" it is clear, therefore, that the sequestration was admitted.] The bishop's licence was contended to be a nullity on another ground, which will be noticed hereafter. As the case stands nothing has ever been taken under the present sequestration, and the former one may have been a nullity.

Third point.

III. The main question is, whether a sequestration is an incumbrance affecting a benefice within the 18 *Geo.* 2, c. 20. *Doe* v. *Bluck* (*a*) is cited to shew that an incumbent, whose living is sequestered cannot maintain ejectment, and therefore it is urged that such an incumbent is not in *possession* of a freehold within the 18 *Geo.* 2, c. 20; but it is a fallacy to suppose that *the estate in possession* mentioned in that statute means possession on which ejectment may be maintained; the word is only used in contradistinction to an estate in reversion.

The question of what constitutes a "charge or incumbrance" on land was discussed in *Moncaster* v. *Watson* (*b*). In that case, a private act had been passed for inclosing a common, and it enacted that the divided lands (heretofore parcel of the common) should be holden by each allottee, subject to the same *charges and incumbrances* as the lands to which they were allotted; and as certain lands were liable to repair a certain portion of the parish church, it was contended that such a payment constituted a charge; but it was held that these words meant only incumbrances upon the *estate* as dower &c., and did not include a liability to church-rate. The present act being a penal act, the defendant is entitled to the most liberal construction of it; *Hyde* v.

(*a*) 3 Camp. 447. (*b*) 3 Burr. 1375.

Logan (*a*), per *Buller* J.; *Bones* v. *Booth* (*b*); *Com. Dig.* 'Parliament, (R 19, 20). For the purpose of ascertaining whether a sequestration is a charge or not, it is essential to see what a writ of sequestration is. Now it is clear, from the judgment of Lord *Alvanley* C. J., in *Arbuckle* v. *Cowtan* (*c*), and from 3 *Bla. Comm.* 418, and 3 *Burn's* Ecc. Law, 340, that the writ of *levari facias* to the bishop gives only the profits of the benefice to the creditor (and not to him directly), and does not give the possession of the land like a writ of elegit.

The law on the subject was laid down by Lord *Stowell* in *Hubbard* v. *Beckford* (*d*), in which he held that the sequestrator is bound to provide for certain duties and expenses which are incident to and inseparable from the subject-matter of the sequestration, such as the spiritual services of the cure, and dilapidations. Lord *Alvanley* C. J., in *Arbuckle* v. *Cowtan* (*c*), likens the interest of an incumbent in his living to the right of an officer to his half-pay, and shews that, as they are both salaries paid for public services, they are not assignable. Now as the first duty of a sequestrator is to provide for the spiritual service of the benefice, 3 *Burn's* Ecc. Law, Sequestration, 341, if the emoluments were not more than sufficient for that purpose, the rights of the curate would interpose and prevent the creditor from obtaining a farthing under the sequestration. And it will be shewn immediately that the bishop is not enabled to appoint any one as curate, but that he *must* prefer the incumbent. But the Court is pressed with the cases on the 13 *Eliz.* c. 20, to shew that a sequestration is a charge on a benefice. It is true if a warrant of attorney is given, with authority to issue execution whenever an annuity is in arrear, it then constitutes a continuing charge, according to the decisions of *Flight* v. *Salter* (*e*), *Saltmarshe* v. *Hewett* (*f*),

(*a*) 2 Doug. 699.
(*b*) 2 W. Bl. 1226.
(*c*) 3 B. & P. 326.
(*d*) 1 Hag. Con. Rep. 307.
(*e*) 1 B. & Ad. 673.
(*f*) 1 A. & E. 812; *S. C.* 3 N. & M. 656.

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and *Newland* v. *Watkin* (*a*). But if the warrant of attorney is only given to enable a sequestration to issue for a debt actually due, then it is not a charge under that statute; *Aberdeen* v. *Newland* (*b*), *Colebrook* v. *Layton* (*c*). Other cases have been referred to, where the giving a warrant of attorney has been held to constitute a charge, such as *Sharpe* v. *Thomas* (*d*), but there the decision proceeded on the ground that a warrant of attorney, being given by an insolvent to the detriment of his creditors at large, was a fraud. So also in *Doe* v. *Carter* (*e*), where there was a covenant by a lessee not to transfer the lease, and the lessee gave a warrant of attorney for the express purpose of enabling the creditor to take the lease in execution, this was held to be in fraud of the covenant; but at an earlier stage of the case (*f*), where it did not appear that the warrant of attorney was given with that express purpose, it was held that it was no forfeiture, and that the warrant of attorney was not a specific lien on the estate.

Fourth point.

IV. The defendant was entitled to reside on his benefice and discharge the duties. No one can perform spiritual duties, even in a chapel of ease within a parish, without the consent of the incumbent, who is in law "conservator parochiæ;" *Farnworth* v. *Bishop of Chester* (*g*), *Bliss* v. *Words* (*h*), *Williams* v. *Brown* (*i*). The bishop therefore could not appoint any curate without the defendant's consent. But it may be shewn further, that the defendant was bound to officiate himself. The 21 *Hen.* 8, c. 13, s. 26, which requires a beneficed clerk to reside on his living, (and the 57 *Geo.* 3, c. 99, re-enacts the same law) was discussed in *Doe* v. *Mears* (*k*), where the living was under sequestration, and Lord *Mansfield* C. J. held that that was no impediment

(*a*) 9 Bing. 113. See the case more fully reported, 1 Law Jour. C. P. 177, New Ser.

(*b*) 4 Sim. 281.

(*c*) 4 B. & Ad. 578; *S. C.* 1 N. & M. 374.

(*d*) 6 Bing. 416.

(*e*) 8 T. R. 300.

(*f*) 8 T. R. 57.

(*g*) 4 B. & C. 555; *S. C.* 7 D. & R. 56.

(*h*) 3 Hagg. Ecc. R. 486.

(*i*) 1 Curteis, 53.

(*k*) Cowp. 129.

or prevention to the serving a cure, and that the incumbent's non-residence was unjustifiable. It is clear, therefore, that the defendant does not reside by the licence of the bishop, but in obedience to the law. He is also bound to reside *in* the parsonage house, *Law* v. *Ibbotson* (*a*); and as the case finds that the house and lands are worth 100*l.* a year, and as it is shewn that he resides there as of his old estate, and not under the licence of the bishop, on this point also he is entitled to the verdict.

V. The point as to the 120*l.* stipend depends on the same reasoning. For as the defendant is bound to reside on his living and to officiate, and as he is entitled to a reasonable salary (which 120*l.* must be taken to be) for performing the duty, which is paramount to the creditor's rights under the sequestration, then it follows that he receives it as of his old estate. For not only the spiritual duties of the benefice must be first provided for, but also the necessary repairs of the parsonage &c., before the sequestrator can apply the rents and profits to the creditor. Again, as the sequestrator receives the rents and profits of the benefice in order to discharge the debts of the defendant, the sequestration is altogether for the defendant's benefit, and is not at all a charge, as it would be if the lands themselves were taken under an elegit. Where a person creates a voluntary trust for the benefit of his creditors, it is held in equity to be a trust for the benefit of himself; *Wallwyn* v. *Coutts* (*b*), *Garrard* v. *Lord Lauderdale* (*c*), recognized in *Bell* v. *Cureton* (*d*). This principle therefore affords a substantial answer to the case, for it shews that the sequestration itself is of value to the defendant, and merely directs the rents and profits of his benefice to be applied in a particular manner for his own benefit. Fifth point.

VI. On the actuary's evidence (although the mode of calculation is objected to) it appears that the defendant has an interest of 100*l.* for his life. Sixth point.

(*a*) 5 Burr. 2722.
(*b*) 3 Mer. 707.
(*c*) 3 Sim. 1.
(*d*) 2 Myine & K. 503.

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First point.

Sir *W. W. Follett*, in reply. [Lord *Denman* C. J. W[illegible] wish to hear you only as to the admissibility in evidence o[illegible] the writ of sequestration, and as to whether the defendan[illegible] has not been in all along of his old estate.] The objectio[illegible] is understood to be, that the judgment roll did not contai[illegible] the award of execution, but such an objection is quite un[illegible] tenable, for the entries of execution are never made on th[illegible] judgment roll till long after execution; this is quite allow[illegible]able, as appears by *Taylor* v. *Gregory* (*a*). At the trial the judgment was produced; the writ of fi. fa. to the sheriff; his return of nulla bona, and that the defendant had no lay fee but that he had a benefice; the writ of levari facias to the bishop reciting the writ of fi. fa. and commanding him to sequester the living, and the bishop's warrant thereupon; the chain of evidence therefore was complete. [*Patteson* J. In *Ramsbottom* v. *Buckhurst* (*b*), the judgment roll did contain the award of execution, and it was held sufficient, but it does not by any means follow that the production of the writ itself would not have been evidence, and it seems difficult to contend that it is not the best evidence.] In that case the objection was, that the writ itself was not produced. [*Coleridge* J. I take the objection to be, that it does not appear by what authority the writ of *levari facias* issued; but surely if a judgment is produced, and a writ of execution professing to issue upon it, the writ must be taken to issue in pursuance of the judgment.]

II. It is not contended that a sequestration vests the benefice in the creditors, but *Doe* v. *Bluck* (*c*) shews clearly that it takes the possession out of the incumbent, and vests the estate in another party. Then although the incumbent may be entitled to reside on his benefice and to perform the duties of his cure, he is not entitled to any salary, unless the bishop choose to assign one to him. If therefore there is a salary assigned to him, it is clear that he takes it by virtue of the bishop's licence, and not in

(*a*) 2 B. & Ad. 257.
(*b*) 2 Maule & S. 565.
(*c*) 3 Camp. 447.

right of his old estate. The defendant's right arising from his freehold estate, is entirely taken out of him by the sequestration. Suppose the bishop had fixed the stipend at 60*l.* a year, and there had been an appeal to the archbishop, and he had confirmed it, the decision would have been binding. [*Patteson* J. Do you contend that the sequestrator takes any estate in the parsonage house?] The freehold estate no doubt continues in the vicar, but the sequestration takes away from him the possession. But it is not necessary to go into this argument, as the house by itself is worth only 30*l.* a year, and the sequestrator is clearly entitled to all the profits of the land adjoining the house. With regard to the construction of the statutes, it has been well observed (*a*), "neither is it true, as it has been sometimes put, that the Court in the exposition of penal statutes are to narrow the construction." "We are to look to the words in the first instance," said *Buller* J. in *Rex* v. *Hodnett* (*b*), "and when they are plain we are to decide on them."

Cur. adv. vult.

Lord DENMAN C. J., on this day, delivered the judgment of the Court.—This was an action brought upon the statute 18 *Geo.* 2, c. 20, for a penalty of 100*l.* against the defendant, for acting as a justice of the peace without a proper qualification. By the third section of the act, the proof of qualification lies on the defendant; and that qualification is contained in the first section, which enacts, "that no person shall be capable of being a justice of the peace, or of acting as such &c., who shall not have, either in law or equity, to or for his own use and benefit, in possession, a freehold, copyhold or customary estate for life, or for some greater estate &c., of the clear yearly value of 100*l.* over and above what will satisfy and discharge all incumbrances that affect the same, and over and above all rents and charges payable out of or in respect of the same; or who shall not be seised

(*a*) 2 Dwarr. Stat. 737. (*b*) 1 T. R. 96.

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of or entitled unto, in law or equity, to and for his own use and benefit, the immediate reversion or remainder &c., of the clear yearly value of 300*l.*" (His lordship then recapitulated the facts stated in the case.)

It was objected on the part of the defendant, that the writ of sequestrari facias was not admissible in evidence, because the judgment roll in *Watkins* v. *Tarpley* contained no entry of an award of the writ; but no authority was shewn for the necessity of such entry, nor do we think it at all important.

Again, it was objected that nothing was applied by the sequestrator under this writ, and that it was not shewn by any legal evidence how the profits of the vicarage were disposed of. The answer is, that the sequestrator is shewn to have been in possession under the writ, and to have received the profits; whether he has disposed of them properly, is immaterial to the present question.

Much discussion took place as to the meaning of the words "in possession," in the first section of the act, whether they are used solely in contradistinction to the words "in reversion or remainder," in the latter part of the clause, or have reference to the actual possession also. And the words "to his own use and benefit" were also much commented on. But as our decision turns upon the part of the clause relating to incumbrances and charges, it is not necessary to give any opinion on the other parts.

The question is, whether it appears by the facts found, that the defendant has an estate for life, of the clear yearly value of 100*l.* over and above what will satisfy and discharge all incumbrances that affect the same. Now, whatever may be the true construction of the statute of 13 *Eliz.* c. 20, as to charges upon benefices, and whatever may be the proper rule to be established from the various cases decided under that act, we can have no hesitation in holding that a sequestration is an incumbrance that affects the defendant's estate for life in his vicarage, within the meaning of the act of parliament. The clear yearly value of 100*l.*, contemplated by

ıe act, is plainly that which comes into the pocket of the wner of the estate as such, after all other demands upon it re satisfied; and we are to see whether, upon the facts tated, such clear yearly sum of 100*l.* does come into the efendant's pocket as vicar.

The difficulty in the case arises from his continuing to eside and occupy the house and grounds, which are found o be above the yearly value of 100*l.* If he be in the occuıation of them by right as vicar, notwithstanding the sequesration, and could not be put out from them, or compelled to pay any rent for them, by any proceeding whatever, it is impossible to say that he has not an estate for life in them, or say that they are affected by the sequestration, and if not, their value is sufficient.

Now, with respect to the house, it seems clear that the defendant is in the occupation as vicar, and that the assignment of it to him as a residence by the bishop is merely void, inasmuch as the incumbent is bound so to reside, notwithstanding any sequestration, and the bishop could not turn him out, nor change his character from that of vicar to that of stipendiary curate.

But it is not found by the case that the house alone is of the yearly value of 100*l.*, and as the onus lies on the defendant we cannot presume it to be so. The grounds and stipend must therefore be taken into consideration, and with respect to them the case is very different.

The sequestrator might undoubtedly let the grounds as well as any other part of the glebe, and raise a profit towards the purposes of the writ; and though they are not so let, but assigned to the defendant by the bishop, they, as well as the stipend of 120*l.*, also assigned him by the bishop, are by no means enjoyed by him simply as vicar in his own right. The amount of the stipend seems to be in the discretion of the bishop, though probably that discretion would be exercised with reference to the salaries specified in the Stipendiary Curates' Act, in which case the stipend could not be less in respect of the vicarage in question than 120*l.*;

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and though the bishop cannot appoint any person to serve the church, either instead of or in addition to the vicar, and cannot by his licence alter the vicar's character, and must assign to him the proper stipend out of the profits of the living, prior to any other payments, yet we are of opinion that the defendant, as regards the grounds and stipend, takes under the bishop, and not simply as vicar, and that his enjoyment of the grounds and stipend arises out of and is under the sequestration, so that it cannot be said in fact or in law that the defendant has an estate of the clear yearly value of 100*l.*, *over and above* all incumbrances that affect the same.

For these reasons we are of opinion that the defendant has failed to establish his qualification, and our judgment must be for the plaintiff.

Judgment for the plaintiff.

The QUEEN *v.* The HUNGERFORD MARKET Company. Ex parte PALMER.

Saturday, January 12th.

By the 11 *Geo.* 4, c. lxx. the Hungerford Market Company are empowered to make compulsory purchases of land for the use of the market; and by section 19 all tenants for years, from year to year, or at will, occupiers of any part of the estate called the Hungerford House &c., or therewith contracted to be purchased by the Company, who shall or may sustain or be put unto any loss, damage or injury, in respect of any interest whatsoever, for good-will, *improvements*, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing the act, shall receive compensation from the Company. While the Company were treating for the purchase of certain premises, under the act, a person entered into an agreement to rent them for one year, and that if, with the owner's consent, he should hold beyond the year, he should quit, or be at liberty to quit, at any quarter day, on receiving or giving three months' notice; that he would not underlet or give up possession to any one, make any alteration without a written consent of his landlord, would keep all the glass entire, and so leave the same, together with all articles mentioned in a schedule, and all *improvements* or additions which he should make during his occupation, for the benefit of his landlord. The tenant occupied, with the consent of his landlord, for several years, while the above negotiations were proceeding. He afterwards received due notice to quit, and the purchase by the Company was completed:—Held, that he was not entitled to compensation from the Company in respect of improvements made by him during his occupation.

A Rule nisi had been obtained on behalf of the said *Palmer*, for a mandamus to the said Company, commanding them to issue their warrant to the high bailiff of Westmin-

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er, requiring him to summon a jury under the 11 *Geo.* 4, xx. (the Hungerford Market Company Act), for the purse of assessing the damage and recompence to be given the said *Palmer* for improvements, tenants' fixtures, and herwise, in respect of the messuage and premises lately ccupied by him in Little Hungerford Street; and also in espect of his interest in a certain messuage late in his occupation, and for the good-will of the trade attached thereto, and for his interest in certain stairs or landing-places occupied by him, with the power of taking toll, and for the loss in respect of any interest whatsoever for good-will, improvements, tenants' fixtures, or otherwise, which he had or might sustain in respect of his interest in the said last-mentioned messuage and stairs, by reason of the passing of the said act.

The above rule was, by consent of the parties, under a subsequent rule of Court, referred to a barrister to dispose of, and to make such further inquiries, and award such compensation, if any, to *Palmer*, as he (the arbitrator) should think fit, exclusive of good-will, in respect of the said house and premises late in *Palmer's* occupation; and the arbitrator was, by an order made with the consent of the parties, to have power to raise any points of law for the opinion of this Court. The arbitrator by his award directed that the Company should pay *Palmer*, exclusive of good-will and of the matters thereinafter mentioned, 125*l.* He also found that part of the compensation claimed was for improvements upon a house called the Globe Public House, which had been part of the Hungerford Market estate. He then stated the following facts:—The occupation of the said public house commenced under an agreement made December 28, 1824, between *Palmer* and Mr. *Wise*, the then owner of the Hungerford Market estate, of which the premises were parcel, for one year, commencing the 29th September preceding. The agreement contained the following stipulations—that if *Palmer*, with *Wise's* consent, should hold beyond the year, he should quit, or be at liberty to quit, at any

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quarter-day, on receiving or giving three months' notice that he should not underlet or give up possession to any one or make any alteration without the written consent of *Wise*; he was to keep all the glass entire, and so leave the same, together with all the articles mentioned in a schedule, and *all improvements or additions to the premises, which he should make during his occupation, for the benefit of Wise.* On the 31st of July, 1824, *Wise* had offered the Hungerford Market estate to Sir *G. Tyrrhitt*, on behalf of the intended Market Company; the offer was made on certain written terms, to which a decided answer was to be given in eight months; no answer was returned within that period, but in December, 1830, the purchase was completed. Notice to quit at Michaelmas, 1830, was duly given by *Wise* on the 23d June preceding, and *Palmer* finally gave possession in April, 1831, after a verdict recovered in ejectment, wherein *Wise* and the Hungerford Market Company were severally lessors of the plaintiff. In 1826, *Wise* gave *Palmer* leave to extend his bar, and during his occupation, and before the passing of the Hungerford Market Act, *Palmer* made certain other improvements; these were given up with the rest of the premises, and were valued by the arbitrator at 44*l.* 10*s.* The award found that the notice to quit and the giving up of the public-house and improvements, took place by reason of the passing of the said act. The question was then stated by him for the opinion of this Court, whether *Palmer* was entitled to compensation in respect of the said improvements.

The case was argued (*a*) at the sittings in banc after last Michaelmas term, by *Platt* for the claimant, and *Hayward* for the Company.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This case arises upon a demand for compensation,

(*a*) Nov. 30th, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

under the Hungerford Market Act, 11 *Geo.* 4, c. lxx. and the only question is, whether, under the circumstances hereafter stated, *Palmer*, the applicant, is entitled to be compensated for improvements made by him during his occupation of premises, which the Company have purchased and used for the purposes of the market. (His lordship then stated the facts of the case.) Upon the argument of this case the several decisions, which are reported upon the 17th and 19th sections of the act, were cited. These are *Ex parte Farlow* (*a*), *Ex parte Wright* (*b*), *Ex parte Davies* (*c*), *Ex parte Still* (*d*), *Ex parte Gosling* (*e*). The principle upon which the Court has proceeded in these cases in the construction of the act, is clear and satisfactory; it has been thought that the compensation clauses, the 17th and 19th (*f*), should be construed most liberally in favour of those who are to receive benefit from them, and most strongly against the Company, who framed them; and it has further been considered, that the 19th clause must be extended to other than legal interests which are provided for by the 17th. These principles however do not exclude an examination into the particular circumstances of each application, and where it has appeared that the party has in reality sustained no injury from the proceedings of the Company, not merely in his legal or equitable interests, but not even according to any expectations which he may reasonably have entertained, the Court has refused to interfere. Therefore in *Ex parte Wright* (*b*) the party was held entitled to

(*a*) 2 B. & Ad. 341.
(*b*) 2 B. & Ad. 348.
(*c*) 4 B. & Ad. 327.
(*d*) 4 B. & Ad. 592.
(*e*) 4 B. & Ad. 596.
(*f*) By section 17, every lessee or tenant for years or at will, &c. was to deliver up possession to the Company at three months' notice, on receiving compensation.

By section 19, tenants for years, from year to year, or at will, occupiers of any part of the market, called the Hungerford House, &c., or therewith contracted to be purchased by the Company, who shall "sustain any loss, damage or injury, in respect of any interest whatsoever, for good-will, improvements, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing of this act," are to receive compensation.

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no compensation, who held under Mr. *Wise* on an agreement for one year certain, with liberty to the landlord afterwards to determine the tenancy in any year, at three months notice, and with a stipulation also that the tenant should not underlet or give up possession of the premises without leave in writing. Two other rules were discharged at the same time of parties applying under similar circumstances. This case is shortly reported, but it did not pass without consideration, coming on soon after *Ex parte Farlow* (*a*), when the act was fresh in the minds of this Court; and it has been treated as proceeding on a sound distinction in several cases that have followed. In one of these, *Ex parte Gosling* (*b*), the applicant had covenanted to yield up the premises *with all fixtures and improvements;* upon which, although he was allowed compensation for the loss sustained in respect of good-will, or the chance of a beneficial renewal of his lease, on the authority of *Ex parte Farlow* (*a*), he was held not entitled to any in respect of fixtures or improvements, though it was said the compensation jury might consider them so far as they added to the chance of a beneficial renewal. In the present case they stand alone, and the applicant is in the same situation as *Wright* in respect of his general interest, and *Gosling* in respect of his improvements. It may fairly be collected that the peculiar stipulations which the agreement contains were introduced by *Wise*, with a view to completing his sale on more favourable terms for himself, by having an estate to dispose of less encumbered with valuable interests in the tenants. *He* must be taken therefore to have received his compensation from the Company in a higher price, and they will have to pay twice over for the same thing, if we were to hold the present applicant entitled. It is probable that in many cases, where the facts left this matter doubtful, they have done so, but we think we ought not to proceed further than the line laid down in *Ex parte Farlow* (*a*), and as this is precisely

(*a*) 2 B. & Ad. 341. (*b*) 4 B. & Ad. 596.

within *Ex parte Wright*, and the distinction taken in *Ex parte Gosling* (*a*), and we think those cases rightly decided, the rule will be discharged.

Rule discharged.

(*a*) 4 B. & Ad. 596.

The QUEEN *v.* The Inhabitants of ST. MARY KALENDAR.

Wednesday, January 23rd.

UPON an appeal against an order of two justices for the removal of *Stephen Gay*, *Maria* his wife, and their six children, from the parish of St. Maurice, in the county of Southampton, to the parish of St. Mary Kalendar, in the said county, the Southampton Quarter Sessions confirmed the order, subject to the following case:

The respondents called the pauper, *Stephen Gay*, who proved that he took a house in the parish of St. Mary Kalendar, of a Mrs. *Page*, on the 5th of October, 1835, at the yearly rent of 16*l.*, payable quarterly, and that such tenancy might be put an end to by giving a quarter's notice at any period; that at the end of the first quarter he paid the rent then due; that he then complained of the rent being too high, and said that he should quit; that his landlady then stated that if he would remain, she would take off 10*s.* per quarter from the rent, which was agreed to, and the parties afterwards acted in accordance with such agreement; that he resided in the house till the 26th day of September, 1836, when he with his family removed into a house which he had in another parish, having locked up Mrs. *Page*'s house, in which he left only some few of his

On the 5th October, 1835, the pauper took a house at 16*l.* a year, payable quarterly, and the tenancy was determinable by a quarter's notice, given at any period. At the end of the first quarter, 10*s.* a quarter was taken off the rent. He resided in the house until the 26th Sept. 1836, when he removed to another parish. He left some trifling property behind him in the house, and kept the key of it until the 5th October, 1836, when he completed payment of the year's rent. He was rated to all the rates made during his tenancy, and paid them all except the last rate, made on the 29th September, and confirmed and allowed on the 4th October, and published on the 9th:—Held, that there was a hiring and occupation for a year under 6 *Geo.* 4, c. 57, and that he gained a settlement by payment of rates; the 4 & 5 *Will.* 4, c. 76, s. 66, which enacts that after the passing of the act no settlement shall be gained by *occupying a tenement* unless the occupier shall have paid rates in respect of such tenement for one year, not applying to settlements by payment of rates.

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things; that his landlady, on being applied to on the 29th of September, refused to accept the key of the house till the 5th of October, on which day he surrendered the key of the premises and paid the remainder of his rent; that he was rated to all the rates made between the 5th October, 1835, and the 5th October, 1836; that he had paid all except the last rate, which was made on the 29th September, confirmed and allowed on the 4th October, and published on the 9th. This last rate he paid no part of, though his name was inserted in it, nor was it proved to have been demanded of him. It was admitted that the pauper had not gained a settlement under 1 *Will.* 4, c. 18, in consequence of his having taken in lodgers during part of the year; but it was contended by the respondents that he had gained a settlement in the appellant parish by payment of parochial rates; and the sessions being of that opinion, confirmed the order.

The question therefore for the opinion of the Court is, whether the payment of rates under the circumstances above stated was sufficient (especially since the passing of the stats. 6 *Geo.* 4, c. 57, and 4 & 5 *Will.* 4, c. 76,) to confer a settlement in the parish of St. Mary Kalendar.

Bere and *C. Saunders* argued in support of the order of sessions, on a former day in this term (*a*). The decision in *Rex* v. *Stoke Damarel* (*b*) having shewn that settlement by paying rates still exists, the question is whether such a settlement has been gained in the present case. Sect. 66 of 4 & 5 *Will.* 4, c. 76, enacts that "no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same in respect of such tenement for one whole year." But it may be doubted whether this section applies to the head of settlement by

(*a*) Jan. 19th, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.

(*b*) 1 N. & P. 453.

ıting, as it appears to point only to settlements by occuying a tenement, and if so, it is immaterial whether the auper paid rates for a whole year, *Rex* v. *Ringstead* (*a*); nd all the conditions in 6 *Geo.* 4, c. 57, requisite for gainıg a settlement, have been complied with. But if that ɔction does apply, still a settlement was gained; for, first, if ıe pauper's year of occupation under 6 *Geo.* 4, c. 57, be ɔckoned from the 5th October, 1835, to 5th October, 1836, e has paid all the rates made upon him during the year; ɔr the last rate, which was made on the 29th September, ras not published till the 9th October. This appears from he enactment of the 17 *Geo.* 2, c. 3, s. 1, which expressly leclares that no rate shall be reputed sufficient so as to colect the same unless such notice of its allowance has been given. This point was considered in *Rex* v. *Newcombe* (*b*), *Rex* v. *Justices of Wiltshire* (*c*), and *Rex* v. *Micklefield* (*d*). [Lord *Denman* C. J. We also considered the point in *Reg.* v. *Watts* (*e*).]

Secondly. There is a question whether there has been sufficient occupation for a year under 6 *Geo.* 4, c. 57. That statute has not received so strict a construction as the later act, 1 *Will.* 4, c. 18, under which an exclusive occupation is required; *Rex* v. *St. Nicholas, Rochester* (*f*); and therefore a constructive occupation is quite sufficient; *Rex* v. *Great Bentley* (*g*).

Lastly. The pauper held these premises under a yearly hiring, commencing on the 5th October, 1835. The provision as to a quarter's notice does not make it the less a yearly hiring; *Rex* v. *Herstmonceaux* (*h*). It is true an agreement was come to at the end of the first quarter as to the amount of rent, but that was no alteration of the tenancy.

(*a*) 7 B. & C. 607; *S.C.* 1 Mann. & R. 448.
(*b*) 4 T. R. 363.
(*c*) 8 B. & C. 380; *S.C.* 2 Mann. & R. 401.
(*d*) 1 Bott, 291.
(*e*) 2 N. & P. 367.
(*f*) 5 B. & Ad. 219.
(*g*) 10 B. & C. 520; *S. C.* 5 Mann. & R. 559.
(*h*) 7 B. & C. 551; *S.C.* 1 Mann. & R. 426.

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Smirke and *Rawlinson*, contrà. To gain a settlement under the 6 *Geo.* 4, c. 57, there must be a yearly hiring, an occupation for the whole year, and payment of all parochial rates during that period. It is doubtful whether any of these conditions were complied with. Perhaps *Rex* v. *Herstmonceaux* (*a*) may decide that the hiring in this case was yearly, although but for that case it would rather appear to be a quarterly hiring. But it is submitted that what took place at the end of the first quarter amounted to a surrender: *Rex* v. *Banbury* (*b*). *Rex* v. *Chilton* (*c*) is a very similar case under a different head of settlement.

As to the occupation, in *Rex* v. *Ditcheat* (*d*) it was decided, by two judges against one, that a pauper who rented a dwelling-house, but let part of it, might gain a settlement under 6 *Geo.* 4, c. 57; but it seems to have been assumed on all sides that the occupation by the pauper must be personal, i. e. either by the actual residence of himself or family, or the house must be kept for him for the express purpose of occupation. *Littledale* J. in that case said, there is a "material difference between holding and occupation." Here the pauper left the house vacant, and without any *animus revertendi*. Such a vacant possession would not be subject to rates, according to the practice of rating.

Lastly, as to the payment of rates. Even if the 4 & 5 *Will.* 4, c. 76, s. 66, does not apply to the present case, still, to gain a settlement under the 3 *W.* & *M.* c. 11, s. 6, which enacts, that a party who shall be charged with and pay his share towards the public taxes of the parish shall have a settlement there, all the rates made during his year of occupation must be paid; otherwise he does not pay his share. But 4 & 5 *Will.* 4, c. 76, s. 66, clearly applies to every kind of settlement into which the occupation of a tenement enters. If the Court decides this was a yearly hiring and occupation

(*a*) 7 B. & C. 551; *S.C.* 1 Mann. & R. 426.

(*b*) 1 A. & E. 136; *S. C.* 3 N. & M. 292.

(*c*) 5 T. R. 672.

(*d*) 9 B. & C. 176; *S.C.* 4 Mann. & R. 151.

for a year, it is impossible to contend that a rate made on the 29th September is not made on that day. No case decides that the day of publishing the rate is the day on which it is made. It is true that the appeal clause has been decided, *Reg.* v. *Watts* (*a*), to date from that day, and very properly, as parties are not likely to know when the rate is made till it is published. So also the 17 *Geo.* 2, c. 3, enacts that no rate shall be sufficient *so as to collect* the same unless it is published; but that clause applies to the collection only. Then if so, all the rates that are made within the year must be paid: *Rex* v. *Bramley* (*b*) and *Rex* v. *Warblington* (*c*).

Lord DENMAN C. J.—We will consider this question; but I cannot forbear saying that words which fall from the bench at different times are pressed to an unwarrantable extent. My brother *Littledale*'s language in *Rex* v. *Ditcheat* (*d*) had reference entirely to the circumstances of the case. The question there was solely whether underletting part of a tenement of 10*l.* destroyed the right to settlement under 6 *Geo.* 4, c. 57.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—The question in this case was, whether the pauper gained a settlement by payment of rates in respect of a tenement. The stat. 6 *Geo.* 4, c. 57, would defeat the settlement unless there was an occupation for a year. We think that there was such an occupation; for *Rex* v. *Great Bentley* (*e*) goes farther than the present case. The 4 & 5 *Will.* 4, c. 76, s. 66, enacts, that from and after the passing of that act "no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the

(*a*) 2 N. & P. 367.
(*b*) 1 Burr. S. C. 75.
(*c*) 3 Burr. S. C. 787.
(*d*) 9 B. & C. 176; *S.C.* 4 Mann. & R. 151.
(*e*) 10 B. & C. 520; *S. C.* 5 Mann. & R. 559.

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same shall have been assessed to the poor-rate, and shall have paid the same in respect of such tenement for one year." It is objected that, as the pauper did not pay rates for a whole year, the above section will prevent his gaining a settlement. It seems however not to apply to the case, for it says that no settlement shall be acquired "by occupying a tenement." But the settlement now under consideration is by payment of rates, and not by occupying a tenement, so that the new poor law does not interfere with it.

Order of Sessions confirmed.

Wednesday, January 23d.

A right to sue upon a contract of indemnity against the costs of an action is first vested when the party to whom the indemnity is given pays the bill of costs, and not when it is delivered to him, and the Statute of Limitations therefore does not begin to run against his right of action until after such payment.

COLLINGE *v.* HEYWOOD.

THE declaration of the 22d November, 1836, stated that the plaintiff was tenant of a certain messuage at a certain rent; that the title to the reversion immediately expectant on the determination of the said tenancy, was in dispute between the defendant and one *Whittell* on the one part, and one *Daniel Potter* on the other; that *Potter*, for the purpose of enforcing his claim as reversioner to the rent, distrained the plaintiff's goods; that the defendant and *Whittell* were desirous that the plaintiff should replevy the distress, and prosecute an action of replevin against *Potter*, and thereupon, in consideration of the premises, and that the plaintiff, at the special instance of the defendant and *Whittell*, had replevied the distress and commenced an action &c., the defendant undertook to indemnify the plaintiff from the distress, and all costs and damages which the plaintiff had incurred, or should thereafter incur, by reason thereof or of replevying the same, or of the action of replevin. Averment, that the plaintiff duly prosecuted the replevin, and that although the plaintiff, before the commencement of this suit, to wit, on the 1st July, 1831, paid divers sums of money in making the replevy and prosecuting the action,

yet that the defendant had refused to indemnify him. The declaration also contained counts for work done, money lent, money paid, and on an account stated.

Plea (among others), that the action had not accrued within six years, which was traversed by the replication.

At the trial before *Bosanquet* J., at the Chester spring assizes, 1837, the plaintiff put in evidence an agreement, made 27th April, 1826, between *Whittell* and the defendant of the one part, and the plaintiff of the other part, which recited the facts stated in the declaration as to the disputed reversion, the distress and the request to the plaintiff to replevy, and contained the following undertaking on the part of *Whittell* and the defendant, "that they and each of them would from time to time, and at all times thereafter, well and effectually save, defend, keep harmless and indemnify the said *E. C.* (the plaintiff), and his respective goods, chattels and effects, of and from the said distress, action or actions, suits, costs, damages and expenses, which are now pending, or may hereafter be commenced, instituted or otherwise incurred by reason or the means of the said *Potter* claiming or suing for his alleged share or parts of any rent or rents arising from the said estate, or any part thereof." A replevin suit was proved to have been instituted by the plaintiff, but was not proved to have been terminated. His attorney in the suit delivered his bill of costs in 1829, but it was not paid by him until 1831. It was contended for the defendant that the present cause of action vested in 1829, when the plaintiff's liability to his attorney attached on delivery of the bill of costs, and that therefore the statute of limitations was a bar to this action; for the plaintiff it was contended that he had no cause of action until he became damnified by payment of such bill of costs in 1831, and that therefore this action, which was commenced in 1836, was in time. The learned judge directed a verdict for the plaintiff.

J. Evans having obtained a rule nisi for a new trial in the following Easter term, on the authority of *Bullock*

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v. *Lloyd* (*a*), *Howell* v. *Young* (*b*), and *Short* v. *M'Carthy* (*c*),

Jervis and *Cottingham* now shewed cause. The question is, when did the cause of action vest under the special agreement. It is clear that it could not have vested at the time the agreement was made, because the agreement, from its nature, could not have been broken as soon as made. This distinguishes the present case from *Howell* v. *Young* (*d*) and *Short* v. *M'Carthy* (*e*), in which the agreement, or duty, and the breach, were simultaneous. In *Battley* v. *Faulkner* (*f*), which belongs to the same class of cases, and which was an action of assumpsit for delivering winter wheat instead of spring wheat, and to which the statute was pleaded, fraud was suggested by the plaintiff to defeat the statute; but it was held that the cause of action arose from the moment of delivering the wheat, and that, if fraud were relied upon, an action of tort should have been commenced. There is another class of cases where the cause of action is complete at the time, as for an assault and battery, or a slander with actionable words, in which the statute runs from the assault, or from the words spoken, and a consequential damage cannot be afterwards sued for (*g*), but in slander for non-actionable words, where special damage is the gist of the action, the cause of action does not vest till the damage accrues (*h*). So if money is lent generally, the statute runs from the lending, but if it is not to be paid for a year, or till demand made, then the six years commence running from those periods only; and so with regard to factors, who are only bound to account on demand, an action for not accounting may be brought at any time within six years after de-

(*a*) 2 C. & P. 119.
(*b*) 5 B. & C. 259; *S. C.* 8 D. & R. 14.
(*c*) 3 B. & Ald. 626.
(*d*) 5 B. & C. 259; *S. C.* 8 D. & R. 14.
(*e*) 3 B. & Ald. 626.
(*f*) 3 B. & Ald. 288.
(*g*) See *Fitter* v. *Veal*, 12 Mod. 542.
(*h*) See *Saunders* v. *Edwards*, Sid. 95.

mand; *Topham* v. *Braddick* (*a*). It is evident, therefore, the statute does not run till the cause of action is complete. It is contended that the cause of action was complete when the attorney brought in his bill in 1829; if so, the plaintiff was entitled to sue the defendant immediately. But suppose the attorney had subsequently brought an action against the plaintiff and recovered, according to the proposition contended for the plaintiff could not have recovered these damages from the defendant, as the plaintiff would already have commenced his action, which vested with the delivery of the bill. *Bullock* v. *Lloyd* (*b*) is relied upon, where *Abbott* C. J. held that the indorser of a dishonoured note, who had promised to indemnify the indorsee against the law expenses if he would sue the acceptor, was liable in an action to the indorsee, although the latter had not paid the expenses; but this clearly is bad law. In all the precedents to be found in 2 *Chitt.* Plead. 197, 6th ed., 1 *Wentworth*, 288, Pleaders' Assistant, 38, where an indemnity has been sued upon, it is always alleged that the surety has paid the money, or has sustained the damage. If the law laid down by *Abbott* C. J. be correct, then the debt would be proveable under a commission of bankruptcy; but the cases shew clearly that is not so; *Goddard* v. *Vanderheyden* (*c*), *Young* v. *Hockley* (*d*), *Young* v. *Taylor* (*e*), *The Overseers of St. Martin's* v. *Warren* (*f*). Besides, on the construction of the agreement it will be seen that there are various modes of indemnifying besides making pecuniary satisfaction. Again, it is a rule between principal and surety, that if the latter has been compelled to pay money for his principal, he may recover it in a count for money paid, and as there is such a count here, and the action is brought within six years of the payment, it is sufficient.

J. Evans contrà. The payment must be authorized by the

(*a*) 1 Taunt. 572.
(*b*) 2 C. & P. 119.
(*c*) 3 Wils. 262.
(*d*) 3 Wils. 346.
(*e*) 8 Taunt. 315.
(*f*) 1 B. & Ald. 491.

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agreement, and cannot be charged against the defendant, if the statute has run against the agreement. If the right of action is to be taken to commence from the time when the bill of costs was actually paid, the statute is illusory, for the plaintiff might have postponed payment for any number of years, and then have brought his action. The authority of *Bullock* v. *Lloyd* (*a*) has not been overturned. The cases cited with respect to proof of debts under bankruptcy do not apply: there are many valid claims which cannot be proved against a bankrupt's estate; claims, for instance, for unliquidated damages. *Battley* v. *Faulkner* (*b*) is a very strong authority for the defendant; there winter wheat had been sold to the plaintiff as spring wheat, and he again having sold it as spring wheat, was compelled, after a suit in Scotland, which lasted many years, to pay damages to his vendee; yet it was held that the plaintiff should have brought his action within six years after the breach of the contract, although damages had been recovered against him within six years, and were laid as special damage. [*Littledale* J. The action was for a breach of contract, so that the right of action must have vested when the breach was committed.] *Howell* v. *Young* (*c*) shews that it is immaterial whether the action is one of contract or of tort.

Lord DENMAN C. J.—We granted this rule on the authority of *Bullock* v. *Lloyd* (*a*), but we think, on consideration, that the authority of that case cannot be sustained. The plaintiff was not damnified until he was called on to pay the attorney's bill, and until he was damnified he had no right of action against which the Statute of Limitations could run.

LITTLEDALE J. (after stating the facts).—It is contended that the plaintiff had a cause of action as soon as the bill of costs was delivered to him; but how could an action on this

(*a*) 2 C. & P. 119.
(*b*) 3 B. & Ald. 288.
(*c*) 5 B. & C. 259; *S. C.* 8 D. & R. 14.

contract of indemnity have been maintained at that time, when he had not been at all damnified? In *Hodgson* v. *Bell* (*a*) the defendant gave a bond to indemnify the obligee, who had been his co-obligor or surety in a former bond, and also to pay the former bond; the defendant having become bankrupt without paying the former bond, when it became due, it was held that the second bond was then forfeited, and might have been proved under his bankruptcy; the question of indemnity did not arise there, as the second bond was forfeited by non-payment of the first, without reference to the plaintiff's damnification. Suppose this had been the case of a bond of indemnity, instead of a parol contract, and the defendant had pleaded *non damnificatus*, the plaintiff would not have made out his case by simply proving the delivery of a bill of costs. This may be idem per idem, but it illustrates the present case.

WILLIAMS J.—It may be equivocal to speak of the time of the plaintiff's liability first accruing. He was liable, in one sense, from the first, in a certain event, but not at all events. In *Battley* v. *Faulkner* (*b*) there was a cause of action at the time of the breach of contract, or there was none at all.

COLERIDGE J. concurred.

Rule discharged (*c*).

(*a*) 7 T. R. 97.
(*b*) 3 B. & Ald. 288.
(*c*) See *Reynolds* v. *Cowper*, contrà, Vin. Abr. Contract, 524, but overruled by Lord *Mansfield* C.J. in *Fenton* v. *Emblers*, 1 W. Bl. 353.

1839.

Saturday, January 26th.

T. P. PECK, J. PECK and S. PECK *v.* The QUEEN.

An indictment charged, in the first count, that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandize, of great quantities of such merchandize, without paying for the same, with intent to obtain to themselves money and other profit. The second count charged that two of the defendants, being in partnership in trade, and being indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors.

Held, 1. that the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare; but that the count was bad for not shewing by what means they were to be defrauded.

2. That the second count was bad for not alleging facts to shew in what manner the deed of sale was fraudulent.

WRIT of error on an indictment for conspiracy, tried before the Recorder of Liverpool, at the October sessions, 1838.

The first count in the indictment alleged that *T. P. Peck*, *J. Peck* and *S. Peck*, falsely, unlawfully and wickedly did conspire, combine, confederate and agree amongst themselves, to deceive, defraud, and to cause and procure to be deceived and defrauded, *divers of her Majesty's liege subjects*, who should bargain with the said *T. P. Peck* and *J. Peck*, for the sale of goods and merchandize, of great quantities of such goods and merchandize of the said subjects of great value, without making payment or other remuneration or satisfaction for the same, with intent to obtain and acquire to the said *T. P. Peck*, *J. Peck* and *S. Peck*, divers sums of money, and other profit and emolument, to the evil example &c. The second count alleged that *T. P. Peck*, *J. Peck* and *S. Peck*, on &c., they the said *T. P. Peck* and *J. Peck* theretofore having been, and then being in partnership in trade together, and being then indebted to divers persons in divers large sums of money, falsely, unlawfully and wickedly did conspire, combine, confederate, and agree amongst themselves, to deceive and defraud the said creditors of them the said *T. P. P.* and *J. P.* of payment of their debts; that the said *T. P. P.*, *J. P.* and *S. P.*, in pursuance of the said conspiracy &c., falsely, unlawfully and wickedly did make and execute, and cause and procured to be made and executed, a certain false and fraudulent deed of bargain and sale, and assignment of cer-

tain fixtures, stock in trade, and good-will, of great value, of and belonging to the said *T. P. P.* and *J. P.*, by and from the said *T. P. P.* and *J. P.* to the said *S. P.*, for divers false and fraudulent considerations, with intent thereby to obtain and procure to the said *T. P. P.*, *J. P.* and *S. P.*, divers sums of money and other emolument, to the great damage of the said creditors, to the evil example &c.

Murphy, for the plaintiffs in error. The objections to the indictment are, that it does not give the names of the parties intended to be defrauded; that it does not contain a statement of a conspiracy to do either an illegal act, or a legal act by illegal means; and that it does not aver an intention to defraud at the conclusion of the counts. "Every indictment," it is said in *Hawk.* P. C. tit. Indictment, b. 2, c. 25, s. 59, "must either charge a man with some particular offence, or else with several of such offences, particularly and certainly expressed, and not with being an offender in general." He then adds several instances of indictments bad for generality, and among them an indictment charging a person with being a common conspirator. In the 71st section of the same chapter, the author treats of the manner in which the body of an indictment at common law must describe the other persons beside the defendant mentioned in it, and observes that it is safest to name them with convenient certainty, which will hardly be dispensed with, except in special cases and for special reasons. In *Rex* v. *Robe* (*a*), judgment was arrested on the ground that the last count, charging the defendant with illegally demanding, as clerk of the market, *of several other persons several sums of money*, was too general. In like manner quantity must be specified, with convenient certainty; *Rex* v. *Gilbert* (*b*). If the parties to be defrauded in this case were unknown to the jurors, it should have been so stated. In *Rex* v. *Gill* (*c*), which may be cited for the crown, the names

(*a*) 2 Str. 999. (*b*) 1 East, 583. (*c*) 2 B. & Ald. 204.

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of the parties conspired against were set out. This indictment is altogether too general; it states no overt act. In *Rex* v. *Fowle* (*a*), it was charged that the defendants did confederate, combine and conspire to cheat and defraud the just and lawful creditors of the defendant *Fowle*, and Lord *Tenterden* C. J. observed, "This count appears to me to be much too general. It does not state what was intended to be done, or the persons to be defrauded. I should be very sorry to give effect to so general a count as this." This may be a conspiracy to do an act perfectly legal, as in *Rex* v. *Seward* (*b*), to exonerate the parish of a pauper. The sale of goods is not stated to have been to the *Pecks;* they might have conspired to get goods sold to others, and to make a profit by the commission, or they might have conspired to get goods sold to themselves on credit, and so to make a profit on the resale. In *Rex* v. *Gill* (*c*) illegal means, namely, false pretences, were stated to have been employed; so also were false rumours alleged as the means in *Rex* v. *De Berenger* (*d*). In the last-mentioned case an objection was overruled, that the persons who were the objects of the conspiracy were not named. But there the conspiracy was to raise the funds on a future day, and to injure any persons who might happen to be purchasers on that day, whose names of course could not be known. But the second count of this indictment says the conspiracy was pointed at the existing creditors of the *Pecks*, whose names might have been ascertained. The second count alleges an overt act, namely, the making a fraudulent bill of sale, but it does not state the facts constituting fraud, or that it was made with the intention to defraud creditors. In both counts, indeed, the intent of the defendants is stated to be to profit themselves.

Cottingham, contrà. The offence charged by this indictment, is a conspiracy to defraud. If there is any offence

(*a*) 4 C. & P. 592.
(*b*) 1 A. & E. 706; *S. C.* 3 N. & M. 557.
(*c*) 2 B. & Ald. 204.
(*d*) 3 Mau. & S. 67.

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charged, the means taken to effectuate it need not appear. In *Rex* v. *Eccles* (*a*), an indictment for conspiring, by wrongful and indirect means, to impoverish *H. B.*, and to hinder him from exercising his business, was held good, though no overt act was charged, and *Buller* J. said, "Nothing need have been said about the means used, as that was matter of evidence." So also in *Rex* v. *Gill* (*b*), the charge was equally general. Again, if there is any offence charged, it is not necessary to allege any intent; where the act is itself unlawful, the intent is inferred; it is only where the act is itself indifferent that it is necessary to allege an evil intent, in order to shew it to be unlawful.

Murphy replied.

Cur. adv. vult.

Lord DENMAN C. J., on the following Monday, delivered judgment.—The first objection was, that the first count of the indictment does not state what particular merchants the defendants intended to defraud. We think there is no weight in this objection, for if the conspiracy was general, they could not know what particular merchants might fall into the snare. Another objection taken to the same count was, that the means by which these persons were to be defrauded are not set out with sufficient particularity. This objection is fatal, for it is consistent with the allegations of this count, that the defendants endeavoured to obtain goods on credit for others, and to obtain a profit to themselves by commission on the sale. For the same reason also, we think the second count bad; for although it alleges that the defendants executed a fraudulent deed to promote their objects, yet it does not shew in what way it was fraudulent, but puts it as a matter of general opinion and inference in the mind of the prosecutor. The judgment therefore must be reversed.

Judgment reversed.

(*a*) 1 Leach, C. C. 274. (*b*) 2 B. & Ald. 204.

1839.

Wednesday, January 30th.

The QUEEN *v.* The Trustees of the SWANSEA HARBOUR.

By a local act trustees were authorized to take lands for the improvement of a harbour, and in case of disagreement with the land-owner as to the price to be paid him, or of his refusal to treat, to direct a sheriff to summon a jury, by whom the price was to be assessed. If the jury gave a greater sum than offered by the trustees, or the same sum, they were to pay all the costs; if a less sum, the costs to be paid equally by both parties; and in the former event, to be recovered by a distress warrant from a magistrate:—Held, that it belonged to the trustees to have the inquisition of the jury properly drawn up, and that therefore they could not object to the sum awarded by it, or have it brought up by certiorari to quash it, on the ground that it did not state the disagreement or the refusal to treat, so as to shew that the jury had jurisdiction, and that it did not state the proportion of the sum assessed to the sum offered, so as to ascertain which party was to pay the costs. *Semble*, that a statement in the inquisition that each party appeared by counsel, was sufficient to shew their disagreement as to price, and that it was not necessary for the inquisition to find the proportion of the sum awarded to the sum offered.

BY 6 & 7 *Will.* 4, c. cxxvi. (local and personal), an act for the alteration and amendment of several acts for the improvement of Swansea Harbour, the trustees therein mentioned were empowered to treat for the purchase of land for the purposes of the act, and to treat with the owners of land with respect to the amount of compensation to be paid for any damage occasioned them in carrying such purposes into effect. Section 33 enacted that, "in case of any difference or dispute between the trustees and any person entitled to lands taken, relative to the price or value, damages or recompence, to be given for the same, which cannot be settled between them, or in case such person shall neglect or refuse to treat, the trustees should be empowered and required to issue a warrant to the sheriff of the county of Glamorgan, to impanel and summon a jury to appear at the quarter sessions, which jury should assess the sum to be paid for the purchase of the land, or the recompence so to be assessed, which verdict and judgment should be binding." By sect. 36, if the verdict were for a greater or for the same sum as offered by the trustees, the entire costs were to be paid by them; if for a less, then in equal proportions by each party: the costs in the former event to be recovered by a distress warrant, to be issued by a justice of the peace. By sect. 39, the verdicts and judgments were to be kept by the clerk of the peace for the county, among the records of the sessions. The trustees gave notice to Mr. *T. S. Benson*, that they should require a certain portion of his land for the purposes of the act, and by agreement with him,

were at once allowed to take possession, in order to avoid delay during the treaty of purchase. The trustees and Mr. *Benson* afterwards disagreeing as to the amount to be paid for the land, a jury was impanelled, under the directions of the act, who assessed the price of the land. An inquisition was thereupon drawn up as follows:—At &c., before &c., *T. S. Benson* v. *The Trustees of the Swansea Harbour*, Claims for compensation &c., under the provisions of an act passed in the 6 & 7 *Will.* 4. An inquisition, taken by virtue and under the powers of an act &c., on the oaths of &c. "The trustees of the said harbour, by their counsel, and the said *T. S. B.* by his counsel, duly appearing before this Court, the said *T. S. B.* being the owner of, or a person otherwise interested in, the lands and premises hereinafter described: the said jurors being sworn to inquire of, assess &c., do assess and give a verdict for the sum of 2865*l.* to be paid for the fee simple of the land, and the further sum of 7476*l.* to be paid by way of recompence for damage. Whereupon this Court doth adjudge and order the said several sums to be paid by the trustees, according to the provisions of the act."

In consequence of a refusal by the trustees to pay the above sums, a rule nisi had been obtained for a mandamus, commanding them to pay. A cross rule had also been obtained by them, for a certiorari to bring up the inquisition, that it might be quashed. Both rules came on for argument together.

Sir *J. Campbell* A. G. and *J. Henderson*, shewed cause against the rule for a mandamus, and supported the rule for a certiorari. The inquisition is defective in not shewing that the proceedings pointed out by the act have been duly taken. Mr. *Benson* asks for the money adjudged to him, and it should appear that there has been a proper judgment. The inquisition, however, does not state that either of the cases had arisen, which alone by the 33d section could give jurisdiction to the sheriff's jury; it does not state either that

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the trustees and Mr. *Benson* had disagreed as to the price to be paid for his land, or that he had refused to treat with them. This inquisition is the act of an inferior court, the jurisdiction of which ought to be shewn: *Rex* v. *The Trustees of the Norwich and Watton Roads* (*a*), *Rex* v. *Manning* (*b*), *Rex* v. *The Mayor of Liverpool* (*c*), and *Rex* v. *Bagshaw* (*d*). Another objection to this inquisition is, that it is not final. How is the question of costs to be settled, when it does not appear whether the sum assessed is greater or less than the sum offered to Mr. *Benson*? If it is greater or the same sum, the whole costs are to be paid by the trustees; if it is less, they are to be paid equally by both parties.

Sir *W. W. Follett* and *E. V. Williams*, contrà. The inquisition is in the usual form, but it is sufficient to say that it is prepared by the Company. The sheriff's jury have nothing to do with the question, whether the parties have disagreed about the price of the land; their duty is merely to assess the price. The very circumstances that the jury was impanelled, and that the parties appeared by counsel before them, shews that they disagreed. Nor had the jury anything to do with the question of costs, which are to be enforced by a different proceeding, in which the facts, on which the liability to costs is to depend, can then be ascertained. None of the authorities cited apply. In this case it is not the party guilty of irregularity in his own proceedings who seeks to enforce them, but the party against whom in invitum they have been directed; and on demanding compensation for his land, he is told by the trustees that he cannot have compensation, because their own proceedings have been irregular. In *Ex parte The London and Greenwich Railway Company* (*e*), an objection, by way of answer to a claim, was taken by that company to their own inquisition, but the Court would not allow it to prevail.

(*a*) 5 A. & E. 563; *S. C.* 1 N. & P. 32.
(*b*) 1 Burr. 377.
(*c*) 4 Burr. 2244.
(*d*) 7 T. R. 363.
(*e*) 2 A. & E. 678; *S. C.* 4 N. & M. 458.

[Sir *J. Campbell* A. G. The trustees have not, in point of fact, anything to do with drawing the inquisition. The clerk of the peace attends to that.]

Lord DENMAN C. J.—They ought to take care that it is properly drawn up; they are the persons who set in motion all the proceedings, and they cannot take advantage of any defect in them. But I am not sure that there is not enough set out in the inquisition to shew jurisdiction; it is stated that counsel appeared for each party. In *Rex* v. *Bagshaw* (*a*), it seems that the objection of the defendants would not have prevailed, if it had appeared that counsel had been heard for them.

LITTLEDALE J.—It rested entirely with the trustees whether to bring the matter before a jury or not, and they must have differed with Mr. *Benson*, or why should the jury have been assembled.

WILLIAMS J.—The appearance of the parties before the jury is enough to shew that they had disagreed. It is said that it should have been shewn by the inquisition itself what was the proportion of the sum awarded by the jury to the sum offered by the trustees, as the costs vary accordingly. But that is not a subject for proof before the jury, but a matter altogether subsequent, and the costs are to be recovered by another substantive proceeding.

COLERIDGE J. concurred.

Rule for a mandamus made absolute.
Rule for a certiorari discharged (*b*).

(*a*) 7 T. R. 363.

(*b*) See *Reg.* v. *Trustees of South Holland Drainage*, *ante*, 79.

1839.

January 14, 16, 21, 23.

The QUEEN *v.* BATCHELDOR. In the matter of the Canadian Prisoners.

1. A judge at chambers has power at common law to issue in vacation a writ of habeas corpus, returnable before himself immediately.

2. A return to a writ of habeas corpus primâ facie imports verity, and, until it is impeached, need not be supported by affidavits or otherwise.

3. *Quære*, by what mode of procedure the return may be impeached, and its truth inquired into.

ON the 28th December, 1838, *Littledale* J., at chambers, on the affidavits of *J. Hume*, Esq., M.P. and *J. A. Roebuck*, Esq., stating that the prisoners after-mentioned had been brought to Liverpool from parts beyond seas, and that they were illegally detained in Liverpool gaol, under pretext that they were state prisoners, although they had not been tried or sentenced as the law requires, granted writs of habeas corpus, directed to *William Batcheldor*, keeper of the gaol of the borough of Liverpool, commanding him to bring up the bodies of *John Grant*, *Linus William Miller*, *William Reynolds*, *Leonard Watson*, *John Parker*, *Finlay Malcolm*, *Robert Walker*, *Paul Bedford*, *Randal Wixon*, *James Brown*, *John Anderson*, and *William Alves*. The writs were made returnable *immediatè* before the learned judge at chambers; but on account of the importance of the case, it was arranged that the prisoners should be brought up before the full Court, in Hilary term, and that the sufficiency of the returns should be there argued.

Semble, that it may be controverted by affidavits.

Quære, whether it can be traversed in pleading, or merely confessed and avoided.

4. The Court may, in its discretion, allow the return to be amended after it has been filed.

5. The gaoler of Liverpool, in a return to a habeas corpus, stated that, by an act of the legislature of Upper Canada, upon the petition of any person, charged with high treason, preferred before arraignment, to the Lieutenant-Governor of the province, and praying to be pardoned, such governor was empowered to pardon him on such terms as might appear proper, and that in case any person should be pardoned on condition of transportation for life or for years, and should return to the province contrary to such condition, he should suffer death. The return then stated that the prisoner was indicted for high treason, and, before arraignment, presented a petition, confessing his guilt and praying for pardon; that he received a pardon on condition that he should be transported to Van Diemen's Land for fourteen years, to commence from his arrival there; to which condition he assented; that, there being no direct means of transporting him from Upper Canada, it was necessary to take him to Quebec, in Lower Canada, whereto he was taken by the authority of the Lieutenant-Governor of Upper Canada, and by virtue of a warrant of the Lieutenant-Governor of Lower Canada was delivered to the custody of the sheriff of Quebec, until he could be transported; that there being no means of transporting the prisoner directly from Lower Canada to Van Diemen's Land, it was necessary to take him to England, and thereupon, by letters-patent, sealed with the seal of the province of Lower Canada, and directed to *A. B.*, captain of a vessel, *A. B.* was commanded to receive the prisoner, and take him to Liverpool, the same being a place which seemed fit to her Majesty, and which was the most convenient in that behalf; that *A. B.* conveyed the prisoner to Liverpool, and there not being the means of conveying him immediately to Van Diemen's Land, it became necessary that

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On Monday, January 14, the prisoners were brought into this Court, in the custody of *Batcheldor*.

Sir *J. Campbell* A. G. proposed that the return to the writ in the case of *John Grant* should be first read.

M. D. Hill, on behalf of the prisoners, claimed a right to elect to have the return in the case of *Leonard Watson* first read.

Lord DENMAN C. J.—We think that all the returns should be read in the first instance, before argument on any particular case.

The return in the case of *John Grant* was then read. It stated that, at the sessions of oyer and terminer and general gaol delivery, holden at Niagara, in and for the district of Niagara, in the province of Upper Canada, on the 18th July, 1838, before the Honourable *Jonas Jones*, one of the justices of her Majesty's Court of Queen's Bench in the said province, and his associates, there duly assigned to take the assizes in and for the said district, the said *Jonas Jones* and his associates having competent jurisdiction in

he should be delivered by *A. B.* into the custody of the gaoler of Liverpool (the party making the return) for safe custody, whilst the means for transmitting the prisoner to Van Diemen's Land were preparing with all despatch.

Held, that the return was not bad for any of the following objections:—

That the prisoner was not a convict, and therefore could not be transported.

That there was no judgment of transportation.

That the colonial legislature could not authorize transportation *intra fines* of another territory.

That the condition of the pardon being transportation for fourteen years, to commence from the prisoner's arrival at Van Diemen's Land, was bad for uncertainty.

That the transportation had miscarried for want of a continued authority from the Governor of Upper Canada throughout the intermediate places between that province and Liverpool.

That the various documents referred to, and especially the letters-patent, under which the prisoner was detained by the party making the return, were not set out.

Quære, if the objections had been good, whether the Court would have discharged the prisoner, if it sufficiently appeared that he was charged with treason.

6. The name of the prisoner, with the names of several other prisoners, occurred in the recital of the letters-patent set out in the return, but his name was accidentally omitted in the mandatory part of the letters. The return stated that his name occurred in the mandatory part also. The Court ordered the return to be amended so as to agree with the letters-patent, as it was improper that any false statement should appear on the records of the Court; but held that the letters were not material to justify the prisoner's detention.

The Court also refused to attach the party, making the return, for such false statement, as it did not appear to have been made wilfully.

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that behalf to hear and determine all treasons, felonies and misdemeanors, committed within the said district, *Grant* was duly convicted of the crime of high treason, by him committed against her Majesty Queen *Victoria*, within the said district and jurisdiction, and thereupon judgment and sentence of death was duly passed and recorded against the said *Grant* for his offence; that, after his conviction, her Majesty, on the 22d October, 1838, by letters-patent under the great seal of the said province, pardoned *Grant*, upon condition that he should be transported to the penal colony of Van Diemen's Land for his natural life; that there being no means of transporting him direct from Upper Canada to Van Diemen's Land, it became necessary to take him to Quebec, in Lower Canada, for the purpose of carrying the conditions of pardon into effect, Quebec being the readiest and most convenient place for that purpose, whereupon, in order to carry the said condition into effect, *Grant* was conveyed, by the authority and warrant of the lieutenant-governor of Upper Canada, into Lower Canada, and upon his arrival there, by virtue of a warrant in that behalf, of Sir *John Colborne*, governor of Lower Canada, was delivered to the custody of the sheriff of Quebec, for safe keeping, until he could be transported according to the said condition, the same being the proper and most convenient custody in that behalf; that there not being any means of conveying him directly from Lower Canada to Van Diemen's Land, it became necessary, in order to carry the said condition into effect, to convey him to England; that thereupon, on the 17th November, 1838, by her Majesty's letters-patent, sealed with the great seal of the province of Lower Canada, and directed to one *D. B. Morton*, master of the bark Captain Ross, her Majesty commanded him to receive *Grant* from the custody of the sheriff of Quebec, and forthwith to transport and convey him to such port of England as to her Majesty might seem fit, to the end that he might be transported to Van Diemen's Land, and to deliver him in England to such persons as might be authorized to receive him; that *Morton* received *Grant* from the said sheriff, and took

him on board the said bark to Liverpool, the same being a place which seemed fit to her Majesty, and which was the most proper and convenient in that behalf, that he might thence be transported to Van Diemen's Land; that *Morton* having arrived at Liverpool on the 17th December, 1838, with *Grant* on board his bark, and there not being the means immediately ready for conveying him from Liverpool to Van Diemen's Land, it became necessary that *Grant* should be placed in some safe custody until the means could be provided of carrying him to Van Diemen's Land, and the gaol for the borough of Liverpool being the fittest place for that purpose, *Morton*, on the day last mentioned, delivered *Grant* into the custody of *Batcheldor*, the gaoler of the said gaol, whilst means were preparing with all diligence for conveying *Grant* to be transported to Van Diemen's Land, and that the above were the causes of *Grant*'s detention in custody.

Sir *J. Campbell* A. G. There are two classes of returns; in the former class are *Grant*, *Miller*, and *Reynolds*, the returns in the cases of *Miller* and *Reynolds* being the same as in that of *Grant*, except that they are stated to have been convicted of felony instead of treason. The other class comprises the returns in the cases of the other nine prisoners, who were pardoned, without conviction or trial.

It was then arranged that one return out of each class should be read, and the return in the case of *Leonard Watson* was then read, as representing the other class. This return was in the following terms:

"I, *William Batcheldor*, keeper of Her Majesty's gaol of and for the borough of Liverpool, in the writ to this schedule annexed named, do certify and return, in obedience to the said writ, that by a certain statute of Her Majesty's province of Upper Canada in North America, intituled 'An Act to enable the Government of this Province to extend a conditional Pardon in certain cases to Persons who have been concerned in the late Insurrection,' made and passed in the first year of the reign of Her present Majesty, by the Queen's most excellent Majesty, by and with the advice and consent of the legislative council and assembly of the said province, under and by virtue of a certain act of parliament made and passed in the thirty-first year of the reign of his late Majesty

Provincial Acts, 1 *Vict.* c. 10.

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King *George* the Third, intituled 'An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty's reign, intituled An Act for making more effectual Provision for the Government of the Province of Quebec in North America, and to make further Provision for the Government of the said Province;' and which first-mentioned statute was duly passed by the legislative council and assembly of the said province of Upper Canada, and assented to in Her Majesty's name by the person who had been appointed, and was, at the time of passing the said first-mentioned statute as aforesaid by Her Majesty, to be the governor of the said province of Upper Canada, reciting that there was reason to believe, that among the persons concerned in the late treasonable insurrection in that province, there were some to whom the lenity of the government might not improperly be extended, on account of the artifices used by desperate and unprincipled persons to seduce them from their allegiance: it was, amongst other things, enacted, that upon the petition of any person charged with high treason committed in the said province, preferred to the lieutenant-governor before the arraignment of such prisoner, and praying to be pardoned for his offence, it should and might be lawful for the lieutenant-governor of the said province, by and with the advice and consent of the executive council thereof, to grant, if it should seem fit, a pardon to such person in Her Majesty's name, upon such terms and conditions as might appear proper; which pardon, being granted under the great seal of her Majesty's said province, and reciting in substance the prayer of such petition, should have the same effect as an attainder of the person therein named for the crime of high treason, as far as regarded the forfeiture of his estate and property, real and personal: and that in case any person should be pardoned under that act, upon condition of being transported or banishing himself from that province, either for life, or for any term of years, such person, if he should afterwards voluntarily return to that province without lawful excuse, contrary to the condition of his pardon, should be deemed guilty of felony, and should suffer death as in case of felony: and I do further certify, that by another statute of Her said Majesty's province of Upper Canada, intituled 'An Act to provide more effectually for the Punishment of certain Offences, and to enable the Governor, Lieutenant-Governor, or persons administering the Government of this Province, to commute the Sentence of Death in certain cases for other Punishment in this Act mentioned, made and passed in the Seventh Year of the Reign of His late Majesty King *William* the Fourth, in the manner and by the Persons and Authority required for that purpose by the said Act of Parliament made and passed in the Thirty-first Year of the Reign of his late Majesty King *George* the Third:' after reciting that it was expedient to make further provision for the effectual punishment of certain offences thereinafter mentioned, it was enacted, 'that in case of the conviction of any person, after the passing of that act, of any larceny or of manslaughter, or of any assault with intent to commit any felony, or of felonious rescue, or of assaulting with any weapon a sheriff or other peace officer in the execution of his duty, or of any forgery which before the passing of that act was not punishable with death with

7 Will. 4, c. 6.

or without benefit of clergy, or of perjury, or of fraud or cheating, or conspiracy, or of being accessory, before or after the fact, to larceny or any other felony, or of receiving stolen goods, or of embezzlement, or of uttering or tendering in payment false or counterfeit money, resembling any of the gold or silver coins current in that province, knowing the same to be false or counterfeit, or of any offence against a certain statute of that province passed in the 50th year of the reign of His late Majesty King *George* the Third, intituled 'An Act for preventing the Forging and Counterfeiting of Foreign Bills of Exchange and of Foreign Notes and Orders for the Payment of Money,' or of assisting in or attempting to effect the escape of a prisoner confined for a felony or other crime, before or after conviction, the person convicted of such offence might be sentenced to such punishment as was then provided by law for any such offence; or, if the Court which was to pass sentence on such convict should think fit, might be sentenced to be imprisoned only, or imprisoned and kept to hard labour or in solitary confinement in the common gaol, or in any penitentiary or house of correction that had been or might be provided in that province for such purpose, for any term not exceeding seven years: Provided always, that where, for any of the offences above-mentioned, a specified term of imprisonment was then assigned by law, no person should be sentenced for such offence to be imprisoned in a penitentiary or other place of confinement for a longer period than such specified term: And provided also, that in case a conviction should take place of any of the offences thereinbefore enumerated, except the offence of manslaughter, which before the passing of that act would have subjected the offender to any punishment provided by the act of the parliament of that province passed in the third year of his then Majesty's reign, intituled 'An Act to reduce the Number of Cases in which Capital Punishment may be inflicted—to provide other Punishment for Offences which shall no longer be Capital after the passing of this Act—to abolish the Privilege called Benefit of Clergy, and to make other Alterations in certain Criminal Proceedings before and after Conviction,' such punishment should in no case be altered or affected by that act; and that no Court of General Quarter Sessions of the Peace, or Court having the like jurisdiction, should have power to sentence any person convicted before them to be imprisoned in a penitentiary for a longer period than two years; and that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of that province, to commute the sentence of death which might be passed upon any person convicted of a capital crime other than high treason or murder, and with authority from His Majesty upon any person convicted of high treason or murder, for transportation for life or term of years to such place in His Majesty's dominions as might be assigned for the reception of convicts or for banishment from that province for life or any term of years, or for solitary confinement, or confinement with or without hard labour, in any penitentiary or house of correction that might be appointed for such purposes, either during life or for any term of years; and that an instrument under the hand and seal of the

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governor, lieutenant-governor, or person administering the government of that province, declaring such commutation of sentence, should be sufficient authority to any of His Majesty's judges or justices in that province having jurisdiction in such cases to make such orders and give such directions under his hand and seal as might be requisite for the change of custody of such convict, and for his conduct to and delivery at any penitentiary or house of correction in that province, and his detention therein, according to the terms on which his sentence might have been commuted; and that the time during which any offender should have continued in any common gaol under sentence of transportation, or under sentence of confinement in the penitentiary, should be reckoned in discharge or part discharge of the term which should be appointed by such sentence: And I do further certify, that by another statute of Her Majesty's said province of Upper Canada, intituled 'An Act respecting the Transportation of Convicts, made and passed in the Seventh Year of the Reign of his late Majesty King *William* the Fourth, in the manner and by the persons and authority required for that purpose by the said Act of Parliament made and passed in the Thirty-first Year of the Reign of His late Majesty King *George* the Third,' after reciting that it was expedient to facilitate the transportation of offenders to such place or places in His Majesty's dominions as might be assigned for the reception of convicts, and to make further provision in respect to the punishment of transportation, it was enacted, 'that notwithstanding any thing contained in a certain act of the parliament of that province, passed in the fortieth year of the reign of His late Majesty King *George* the Third, intituled 'An Act for the further introduction of the Criminal Law of England in this Province, and for the more effectual Punishment of certain Offenders,' it should be lawful after the passing of that act to sentence offenders to transportation, not only in such cases where by any law then in force or thereafter to be passed, it was expressly provided that such offenders might be transported; but also in every case in which by the provisions of the said act passed in the fortieth year of the reign of His late Majesty King *George* the Third, the person convicted would be liable to be banished from that province: Provided always nevertheless, that no offender should, under the authority of that act, be sentenced to be transported except by such Court, and in such cases and for such term of time as the same offender might, according to the said act, be banished from that province, and that nothing in that act contained should extend or be construed to take away or affect the power of sentencing offenders to be banished according to the act thereinbefore recited, when it should appear proper to pass such sentence;' and that all and singular the provisions then in force which were contained in the said act of the parliament of that province, passed in the fortieth year of the reign of His late Majesty King *George* the Third, respecting persons returning to that province before the expiration of the period for which they had been banished by sentence of a court, or had consented to be banished according to the terms of any conditional pardon granted to a convict sentenced to suffer death, should equally

7 Will. 4, c. 7.

extend to and be in force with respect to any person returning from transportation after that act, whether such person should have been sentenced to be transported, or, having been capitally convicted, should have been pardoned on condition of being transported; and that the sentence, in case of transportation, should be that the offender should be transported for a time to be mentioned in such sentence, or for life, where that might be lawful, and should, in the opinion of the court passing such sentence, appear proper, to such place as the governor, lieutenant-governor, or person administering the government of that province, by and with the advice of the executive council thereof, should appoint; and that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of that province, by and with the advice of the executive council thereof, to determine, upon reference to His Majesty's government in England, to what foreign possession of His Majesty convicts should be transported from that province under the provisions of that act, and that an instrument under the sign manual of the governor, lieutenant-governor, or person administering the government of that province, and directed to the judges of the Court of King's Bench, declaring to what colony or place it had been determined to transport any convict, should be sufficient authority for the judge who passed sentence on such convict, or, in his absence, for any other judge of the said Court, to make his warrant authorizing any person or persons to carry and secure such convict in and through that province towards the sea-port or place from whence he or she was to be transported; and if any person or persons should rescue such convicts, or any of them, or assist them, or any of them, in making their escape from such person or persons as should have them in their custody as aforesaid, such offence should be punishable in the same manner as if such convict had at the time it was committed been confined in a gaol or prison in the custody of the sheriff or gaoler after sentence for the crime of which he should have been convicted; and that the time during which any offender should have continued in gaol under sentence of transportation, should be taken and reckoned in part-discharge or satisfaction of the term of his transportation; and that the expenses of carrying that act into execution, so far as respected the removal of convicts in order to their being transported, should be annually laid before both houses of the legislature; and that if, by reason of any difficulty occurring which might prevent the transportation or reception of any convict in any colony or possession of His Majesty, the sentence which should have been passed on any such convict could not be carried into effect, such convict might be detained in prison for a period not longer than that for which he should have been sentenced to be transported, unless it should appear expedient to pardon such convict, in which case it might be made a condition of such pardon that the convict should banish himself from that province for a period not exceeding the residue of the time for which he was to have been transported: And I do further certify, that after passing the said first-mentioned statute, to wit, at a special session of oyer and terminer and gaol delivery, began and

The prisoner's petition and pardon.

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holden at Toronto, in the home district of the said province, on Thursday the eighth day of March, in the first year of the reign of Her said Majesty, before the Honourable *John Beverley Robinson*, Chief Justice of the said province, and others his fellows, justices and commissioners of our said Lady the Queen, under and by virtue of Her said Majesty's commission under the great seal of the said province, issued in pursuance of another statute of Her Majesty's said province, duly passed in the same manner and by the same authority as the said first-mentioned statute, on the twelfth day of January, in the first year of Her Majesty's reign, and intituled 'An Act to provide for the more effectual and impartial Trial of Persons charged with Treason and Treasonable Practices committed in this Province,' the said *Leonard Watson* was indicted for the crime of high treason, and before the arraignment of the said *Leonard Watson*, he the said *Leonard Watson* humbly petitioned the lieutenant-governor of the said province, in accordance with the said statute first herein mentioned, confessing his guilt of the treason charged against him as aforesaid, and professing his penitence, and praying for the merciful consideration of his case, and that Her Majesty's gracious pardon might be extended to him upon such conditions as the said lieutenant-governor of the said province, by and with the advice of the said executive council, should see fit; and the said lieutenant-governor, by and with the advice of the said executive council, did in Her Majesty's behalf consent that mercy should be extended to him the said *Leonard Watson* upon the conditions following: that is to say, that the said *Leonard Watson* be transported and remain transported to Her Majesty's penal colony of Van Diemen's Land, for and during the term of his natural life; to which terms and conditions the said *Leonard Watson* did assent; and the said lieutenant-governor did thereupon, in Her Majesty's name, on the twenty-second of October, in the year of our Lord one thousand eight hundred and thirty-eight aforesaid, by letters-patent under the great seal of the said province of Upper Canada, dated the day and year last aforesaid, pardon, remit, and release the said *Leonard Watson* of and from all and every punishment whatsoever which might be inflicted upon him the said *Leonard Watson* by reason of the treason so as aforesaid confessed by him; upon condition, nevertheless, that he the said *Leonard Watson* should be transported and remain transported to the said penal colony of Van Diemen's Land for and during the term of his natural life."

The return then proceeded, as in the return of *Grant*, to justify the prisoner's detention by the gaoler of Liverpool.

Sir *J. Campbell* A. G., Sir *R. M. Rolfe* S. G., Sir *F. Pollock* and *Wightman*, then objected that these writs of habeas corpus were void, as a judge had no power in vacation to issue a writ of habeas corpus returnable before him. At common law the writ could not be granted except on motion

during term. [*Coleridge* J. In *Blackstone*'s Commentaries (*a*) it is said, "This is a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench, not only in term time but also during the vacation, by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term should intervene, and then it may be returned in Court.'] By the 31 *Car.* 2, c. 2, the writ may issue in vacation, in cases of commitment for criminal offences, other than for treason or felony, and the statute makes provision for bringing the parties committed to trial without delay, but it does not apply where, as in the present case, parties are in custody in execution. The 56 *Geo.* 3, c. 100, merely extends the provisions of the former act to other than criminal cases. At common law a habeas corpus, although a writ of right, is not grantable of course, but only on motion in term time, and on the statement of a sufficient cause of interference; *Rex* v. *Marsh*, (*b*) *Hobhouse*'s case (*c*), and *Brass Crosby*'s case (*d*). "This writ," observes *Coke*, 2 Inst. 53, "is to be granted out of the Chancery, either in the time of the term (as in the King's Bench) or in the vacation; for the Court of Chancery is officina justitiæ, and is ever open, and never adjourned, so as the subject, being wrongfully imprisoned, may have justice for the liberty of his person, as well in the vacation time as in the term." So also in 2 *Hale*, P. C., 145, it is said, the writ "is not regularly to issue nor be returnable but in the term time, when the Court may judge of the return, or bail or discharge the prisoner." [*Coleridge* J. Have you referred to *Crowley*'s case? (*e*)] There Lord *Eldon* overruled the decision of

(*a*) Vol. 3, p. 131.
(*b*) 3 Bulst. 27.
(*c*) 3 B. & Ald. 420.
(*d*) 2 W. Bl. 758, note at the end of the judgment.
(*e*) 2 Swanst. 1.

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Lord *Nottingham*, in *Jenkes's* case, and held that at common law a habeas corpus can issue out of Chancery in vacation; but that is on the ground noticed in the passage already cited from Lord *Coke*, that the Court of Chancery is always open. The same doctrine is adopted in 4 *Bac.* Abr. tit. Hab. Corp. (B.). [*Hill.* The validity of these writs is not rested on the statutes but on the common law.] *Blackstone*, in his Commentaries, refers to three cases, *Rex* v. *Shebbeare*, *Rex* v. *Mary Mead*, and *Rex* v. *Clarke* (*a*), in support of his position that the writ is issuable in vacation at common law; but these are all cases since the 31 *Car.* 2, c. 2.

M. D. Hill was allowed till the next day to answer the preliminary objection, but took this opportunity of calling the attention of the Court to the opinion expressed by the majority of the judges in 1758, before the House of Lords, and to the opinion of *Wilmot* C. J., in his "Opinions and Judgments" (*b*).

Lord DENMAN C. J. on the following day (Jan. 15th,) delivered the judgment of the Court.—We have considered the preliminary objection taken to these writs, and do not think it necessary to hear the counsel for the prisoners in answer to it. We are bound, by the course of practice pursued for eighty years (namely, since 1758), of granting writs of habeas corpus by one judge in vacation, returnable immediately, and returnable before the four judges, and also returnable before the judge himself who has granted them. In 1758 a bill was introduced into the House of Lords for the purpose of remedying some of the defects then complained of in the law and practice of the writs of habeas corpus. The House of Lords desired the opinion of the judges, and seven out of ten of the judges declared that the practice, to which the present preliminary objection is made, was perfectly legal. *Wilmot* J. was of opinion that the same practice was in existence eighty years before that time, so that we have at least a period of double that time to war-

(*a*) 1 Burr. 460, 542, and 606. (*b*) P. 77.

rant our judgment. I am quite aware that we might be occupied for several days by the results of antiquarian researches, and by the production of a number of writs not issued in vacation, but it seems to me that we should be tampering with that great remedy of the subject, the writ of habeas corpus, if we did not say that there are precedents abundant to justify the practice now objected to. According to Sir *H. Gwillim's* interesting account of this matter, in his edition of *Bacon's* Abridgment (*a*), it appears that, when the judges were consulted in 1758, there were included in the majority of seven, *Willes* C. J., *Wilmot* J. (afterwards C. J.), and *Parker* C. B; and *Foster* J., though he was unable to attend, was known to be of their opinion, and to entertain a strong wish to carry the remedy of habeas corpus still further. Lord *Mansfield* also, who was a member of the House of Lords at that time, and therefore did not pronounce any opinion among the judges, has left us the means of well knowing what his opinion was, by the practice he followed in cases like the present. The fact too, that the bill then introduced was dropped, furnishes an argument, that the majority of the judges consulted were considered to have given a sound exposition of the law as it then stood.

Objection overruled.

M. D. Hill referred to the debates in the House of Lords, to shew that Lord *Hardwicke* C. J. also agreed with the majority of the judges (*b*).

The return in the case of *Randal Wixon* (*c*) was also read, which differed from that of *Watson* in this respect only, that the condition of *Wixon's* pardon was stated to be transportation for fourteen years, to commence from his arrival at Van Diemen's Land.

(*a*) Vol. 4. p. 140, Hab. Corp. (B).

(*b*) 15 Parl. Hist. 898.

(*c*) This return was read on Wednesday, Jan. 16th, when a separate argument was had upon it. But as the same points were taken in this case as in that of *Watson*, with reference to which cases, as being the most favourable for the prisoners, this part of the discussion was conducted, it has been thought convenient to consolidate the two arguments.

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Sir *J. Campbell* A. G. desired that the returns which had been read should not be filed, as it might be desirable to amend them, which perhaps could not be done after filing them; and he referred to *Anon.* (*a*)

Lord DENMAN C. J., (after conferring with the officers of the Crown Office) stated that the returns were always filed as a matter of course. That case does not shew that a return may not be amended after it is filed.

At the close of the argument on Tuesday the returns in the cases of *Watson* and *Wixon* were amended, by setting out the provincial statutes, which had been in the original partially referred to. The return in *Watson*'s case is given in its amended form.

M. D. Hill moved (*b*) that *Grant*, *Watson*, and *Wixon* should be discharged.

Hill, *Falconer*, *Roebuck*, and *Fry* were heard in support of the motion. It is proposed to rely, in the course of the argument, upon the case of *Wixon* principally. The return is a mere statement, not verified on oath, and it may be necessary hereafter to contend that it is bad on that account; or at all events to shew that the facts alleged in it had no existence. The very principle on which the writ of habeas corpus depends is, that the crown has a right to know the reason why any subject is restrained of his liberty. It follows, therefore, that there is a right also to know that the reason assigned in the return is really true. But the present return is bad on the face of it, without reference to its verity.

First objection: The prisoner has not been

I. The first objection to the return is, that it does not state that the prisoner has been convicted, without which

(*a*) 1 Mod. 102. See 4 Bac. Abr. 137.

(*b*) The motion in the two former cases was made on Tuesday, Jan. 15th, in that of *Wixon* on the following day. See *ante*, 527, note (*c*).

his transportation to this country is illegal. The *5 Geo.* 4, c. 84, s. 17, an act of the imperial legislature, is the only authority which could justify the detention of the prisoner in England. That section recites, that "whereas by the laws in force in some parts of his Majesty's dominions, not within the united kingdom, offenders *convicted* of certain offences are liable to be punished by transportation beyond the seas, and *other convicts*, adjudged to suffer death in such parts of his Majesty's dominions, have received, or may receive, his Majesty's most gracious pardon, upon condition of transportation beyond the seas, and there may be no means of transporting such convicts to any of the places appointed by his Majesty in council in that behalf, without first bringing them to England;" and then enacts, "that whenever any convict adjudged to transportation by any Court or Judge, in any part of his Majesty's dominions, not within the united kingdom, or any convict adjudged to suffer death by any such Court or Judge, and pardoned on condition of transportation, has been or shall be brought to England in order to be transported, it shall and may be lawful to imprison any such offender in any place of confinement provided under the authority of this act, until such convict shall be transported, or shall be entitled to his liberty." This statute applies to convicts only. There certainly has been no conviction in this case. Will it be contended that what has taken place with respect to this prisoner is equivalent to conviction? The doctrine of equivalents is unknown to the penal laws of this country. The term "convict" is well known to the law, yet the legislature, as if anticipating a case like the present, has guardedly added to that term, "adjudged to transportation by any Court or Judge." What Court or Judge has adjudged transportation in this case? What equivalent has there been for any judicial sentence? Nothing has been done in open Court, but all secretly and in prison. The prisoner, while under duress, presented something, which the gaoler of Liverpool takes upon himself to affirm was a

convicted, and therefore cannot be detained in England in order to be transported.

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petition, containing what he affirms to be a confession, and thereupon, before arraignment, what he calls a pardon was granted. In the most ordinary civil proceedings the law requires, that all acts done by a prisoner should be clearly authenticated to be his voluntary acts. Here the Court is called upon to give effect, as to a voluntary act, to that which was done by a person under duress, and without any solemnity or attestation whatever, although it deprived him for ever both of his property and his freedom. What has taken place then, with respect to this prisoner, was neither a conviction nor any thing equivalent to a conviction. Nor could it be made so by the provincial statute, under which any punishment, however monstrous, if short of death, might be construed to be a pardon. It has none of the incidents of a conviction; if unfounded, it could not be reversed on error; and if the pardon should be ineffectual, and the prisoner were indicted afresh, he might plead not guilty. The actual condition of the prisoner's pardon is illegal on the face of it. The condition is indefinite, namely, transportation for fourteen years, to commence from his arrival in Van Diemen's Land; so that the duration of his punishment must depend on accident, or the caprice of those who had to convey him to that country.

Second objection: There has been no judgment of transportation.

II. The second objection to this return is, that it does not state that any judgment of transportation has been given against the prisoner. The return states, indeed, that the prisoner petitioned that a pardon might be extended to him, on such conditions as to the lieutenant-governor of Upper Canada, with the advice of the executive council, should seem fit; and that a pardon was accordingly extended to him, on condition that he should be transported to Van Diemen's Land for his natural life. But the prisoner's transportation is not made legal by his own assent to it. "The body of a freeman," says *Hobart* C. J. (*a*), "cannot be made subject to distress or imprisonment by

(*a*) Hob. 61.

contract, but only by judgment." It is a well-known principle of English law, that no man can by contract legalise his own punishment. A man may consent to be hanged, without judgment of death passing against him, but the person so hanging him would be guilty of murder. The king has a right to execute a traitor, but has no right at common law to commute his punishment for transportation. That principle was well understood, when the legislature was resorted to for the purpose of authorizing the commutation of the punishment of death for that of transportation, and the Courts of Law were empowered to enter judgment accordingly on the record of conviction. The origin of the practice of transportation is referred to in *Keeling*'s Reports, (temp. *Car.* 2,) p. 45. It does not appear that the governor of Upper Canada has any power to award transportation. If he had, it must be derived from the provincial statute; for no letters-patent were set out, which could be the only other source of such a power. By 27 *Hen.* 8, c. 24, the king's power of pardon is incommunicable. It has indeed been held, on doubtful authority, that he can communicate this power to an officer in the colonies, though not to any one in this country. If, however, this power was communicated to the governor of Upper Canada, it must be contained in the letters-patent by which he was appointed, of which the Court know nothing. The governor could not by the assent of the provincial parliament acquire this power, if it was not conferred on him by the crown. The provincial act, even if well passed, gave the governor no such power as he has exercised. The act enabled him, if it should seem fit, to grant a pardon, upon such conditions as might appear proper. Had the governor, under this provision, authority to inflict, in the shape of pardon, any punishment short of death? Yet if he had authority to transport, as a condition of pardon, he might on the same principle have subjected the prisoner to mutilation or the rack. The act makes the pardon equivalent to an attainder, in regard to

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the forfeiture of property only: it is illegal, therefore, that it should be made to operate personally also against the liberty of the prisoner.

Third objection: The governor of Upper Canada has no power to carry transportation into effect beyond the limits of his own province.

III. Supposing that there had been such judgment of transportation, the governor had no power of carrying it into execution beyond the limits of his own province. If he could transport the prisoner to Van Diemen's Land, it was also legal to transport him to Nova Scotia or Bermuda. But the recent act, 1 *Vict.* c. 112, (the Canada Indemnity Act) is a legislative decision that Lord *Durham*, who was endowed with full legislative powers for both the Canadas, could not make an ordinance for the transportation of offenders to Bermuda. The 5 *Geo.* 4, c. 84, would not avail, for the only object of it was, in those cases where there already existed the power to transport *extra fines*, to enable the authorities in England to assist in carrying that antecedent power into effect. By other imperial acts, the 14 *Geo.* 3, c. 83, and the 31 *Geo.* 3, c. 31, powers were given to the local parliaments to make laws for the good government of the provinces; but such laws only as were to be in force within those provinces, and not out of them. They might *banish* a man out of their own country, but not *transport* him *intra fines* of another country. The 11 *Geo.* 4 & 1 *Will.* 4, c. 39, was thought necessary, as between New South Wales and Van Diemen's Land, to enable the governors of those settlements respectively to treat as convicts persons under sentence of transportation, who might accidentally have been put on shore at the settlement to which they were not sentenced. An English authority was requisite for the detention of the prisoner as a convict in England. Canada was for this purpose a foreign state, and the criminal law of a foreign state could not be executed in this country. "The penal laws of foreign countries," said Lord *Loughborough*, in *Folliott* v. *Ogden* (*a*), "are strictly local, and affect nothing more than they can reach, and can be seised by virtue of their

(*a*) 1 H. Bl. 135.

authority: a fugitive who passes hither comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend." So also it is said by Lord *Coke*, in his 3d Institute, 180, "It is holden, and so it hath been resolved, that divided kingdoms under several kings in league one with another, are sanctuaries for servants or subjects flying for safety from one kingdom to another, and upon demand made by them are not, by the laws and liberties of kingdoms, to be delivered, and this [some hold] is grounded upon the law in Deuteronomy, Non trades servum domino suo, qui ad te confugerit."

Fourth objection: Transportation, if legal, has not been legally conducted.

IV. Even if it be conceded that the prisoner's transportation commenced lawfully, there has been a miscarriage in the conduct of it. The return avers that, in order to transport him to Van Diemen's Land, it became necessary to take him to Quebec in Lower Canada. It then avers, that by the authority and warrant of the governor of Upper Canada, the prisoner was conveyed to Quebec. All exercise of authority on the part of the governor of Upper Canada ends there. The next step is, that the governor of *Lower* Canada delivers the prisoner into the custody of the sheriff of Quebec. What authority had *he* to do so? It is not stated that the governor of Upper Canada gave him any such authority, or made to him any communication on the subject. It is then stated that it was necessary to convey the prisoner to England. But it is not stated that it was necessary for the *governor of Lower Canada* to interfere in the matter. If it was legal for the governor of Upper Canada to have the prisoner conveyed to England, he was the person to call upon and to authorize the governor of Lower Canada, the master of the ship, and all other necessary persons, to lend their assistance. The necessity for conveying him to England could have no real existence. The ship might have gone direct to Van Diemen's Land.

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Some of the prisoners are transported for terms of years to be calculated from their arrival at Van Diemen's Land, so that the lengthening of the voyage will actually increase the length of their punishment. The return afterwards states, that the prisoner was brought to Liverpool, the same being a place which seemed to her Majesty the most proper and convenient in that behalf. How was her Majesty's pleasure signified? It could only be signified by some document, of which there is no mention in the return. Lastly, on the prisoner's arrival at Liverpool, it does not appear that the person making this return had any authority to receive and detain him.

Fifth objection: The return should have set out a warrant and other documents.

V. The last objection to the return is, that the various documents relied upon to justify the detention of the prisoners are not set out. The gaoler of Liverpool has taken upon himself to say that the prisoner was rightfully held in his custody by virtue of certain proceedings which had taken place on the other side of the Atlantic, and by virtue of certain instruments, of the legal effect of which he assumes to be the sole judge. But this Court has a right to know the contents of these instruments, and to form its own judgment upon them; and this is the more necessary, because full credence, it is said, in this stage of the proceedings, must be given to all the allegations in the return. The return states, that the prisoner presented a petition confessing his guilt. Why should not the Court see the petition? It might have contained no such thing as a confession, for a confession is a legal inference, and a witness would not be allowed in open Court to say that a prisoner "confessed." Then again, what did he confess? "His guilt of the treason charged against him." There were many kinds of treason. What was the treason in this case? It is then said that he assented to the conditions of his pardon. How did he assent, by word of mouth or by writing? The Court should know the terms in which both the pardon and his assent to it were expressed. Again, the prisoner could not be detained without a warrant, and yet

the warrant was not set out. In *Rex* v. *Clerk* (*a*), upon a habeas corpus directed to the keeper of Newgate, to bring up the body of *Clerk*, it was returned that he had been committed by warrant in writing to the keeper of Newgate, until he should declare his readiness to take upon himself the office of liveryman, to which he had been elected. The Court there held as follows: "Where a commitment is in Court, to a proper officer there present, there is no warrant of commitment, and therefore he cannot return a warrant in hæc verba, but must return the truth of the whole matter, under peril of an action; but if he be committed to one that is not an officer, as in this case, there must be a warrant in writing, and where there is one, it must be returned; for otherwise it would be in the power of the gaoler to alter the case of the prisoner, and make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will, he makes himself judge; whereas the Court ought to judge, and that upon the warrant itself." *In the matter of Power*, also (*b*), where a bankrupt, who had been committed for not giving satisfactory answers on his examination, was brought up by habeas corpus, it was held that the return was bad for omitting the questions which had been put to him. There must have been a warrant in this case; by the Habeas Corpus Act itself, (31 *Car.* 2, c. 2, s. 5) every gaoler is enjoined, under a penalty, to give a prisoner a true copy of the warrant of his committal, and the omission to set out the warrant in this case is of itself fatal to the return.

Sir *J. Campbell* A. G., Sir *R. M. Rolfe* S. G., Sir *F. Pollock* and *Wightman*, contrà. The first and second objections may be taken together, as they rest upon the same ground, that the 5 *Geo.* 4, c. 84, s. 17, does not authorize the transportation of the prisoner. But it is not sought to bring the present case within the enactments of that statute, which is only employed for the purpose of shewing

First and second objections.

(*a*) 1 Salk. 349. (*b*) 2 Russ. 583.

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that it *recognized* in the colonies an antecedent practice to transport, and to send to England in transitu the persons transported. The recital of the 17th section clearly recognizes that practice; and the enacting part of it, within which it is not sought to bring the present case, provides that *convicts* adjudged to transportation from the colonies, may be sent to the Hulks, and other appointed places in this country, and be subjected to a certain treatment. This section, therefore, did not enact that persons might be transported from the colonies, and might be brought to England in transitu, but it assumed all this in the recital, and is important as a legislative recognition of the power of the colonies to impose transportation, and to bring persons to be transported, as prisoners into this country. There is no act of the Imperial Parliament which gives to our colonies power to inflict the punishment of transportation; they must, therefore, have derived that power, recognized by the 5 *Geo.* 4, from their own legislatures: and one of the provincial acts set out on the return, the 7 *Will.* 4, c. 7, enacts, that it should be lawful to sentence offenders to transportation, not only in cases where, by any law then in force, it may be done, but also in every case in which, by a prior act, banishment may be inflicted. By the 31 *Geo.* 3, c. 31, the legislature of Upper Canada was, by the Imperial Parliament, established as a supreme legislature, having power to pass all acts whatsoever, with the consent of the Crown, whether they were conformable or otherwise to the 14 *Geo.* 3. By the 31 *Geo.* 3, c. 31, no restriction was imposed on the power of the colonial government to grant pardon for high treason, and by the provincial act 7 *Will.* 4, c. 6, power is expressly given to the governor of Upper Canada, with the authority of her Majesty, to commute the sentence of death upon any person convicted of high treason, for transportation. Lastly, the provincial legislature, with the assent of her Majesty, as stated in the return, passed the 1 *Vict.* c. 10, and that is the statute relied on as justifying the prisoners' trans-

portation and detention. That act enables the governor of Upper Canada to extend pardon to certain persons concerned in the late insurrection, on such terms as may appear proper; and provides that, in case any person should be pardoned under that act, on condition of transportation, and should afterwards voluntarily return, he should be deemed guilty of felony and suffer death. Can it then be maintained, that the supreme power of the state cannot enable a person indicted for high treason to pray for pardon, and, as the condition of it, to agree to suffer transportation instead of death? Such a contract, it is true, could not be entered into without the authority of the legislature, but is legal if entered into under that authority. The 13th section of the Habeas Corpus Act itself provides, that nothing in that act shall extend to give the benefit of the writ "to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract." It is unnecessary to inquire whether the governor might have inflicted mutilation or any other monstrous punishment, as a condition of pardon; the legislature of course contemplated such punishments only as were known to the law. The condition of pardon in this case is legal, for if it might be transportation for life, it might, of course, be transportation for any less period; and suppose the condition had been, that the prisoner should be transported for life, but that, if he should be alive fourteen years after his arrival at Van Diemen's Land, he should be set free, would not that be legal? In substance, that was the condition in this case. If the prisoner wished to have the benefit of the pardon, the condition of it must be performed: the pardon was conditional; the prisoner could not make it absolute. It has been said that the provincial act has expressly limited the condition of the pardon to forfeiture of property, but it is obvious that this

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part of the enactment contains an additional term of punishment, and by no means qualifies that which precedes it.

Third objection.

III. The third objection is, that sentence of transportation, pronounced under an act of the legislature of Upper Canada, cannot be enforced beyond the limits of the province. That legislature has the power of enacting, that the punishment of death should be inflicted upon any person guilty of any particular offence. It has therefore the power also of inflicting any lower degree of punishment, such as transportation. There is no act of the Imperial Parliament to authorize transportation from the colonies to any other part of the world; transportation is authorized by themselves, proprio vigore, and the Crown, by virtue of its prerogative, has a right to carry their sentences into effect. By 5 *Geo.* 4, c. 84, s. 3, places of transportation may from time to time be appointed by her Majesty, with the advice of her privy council. The inference drawn from the 11 *Geo.* 4 and 1 *Will.* 4, c. 39, is erroneous. It was not passed to legalize the *transit*, if it should be necessary, of any convict from Van Diemen's Land to New South Wales, or vice versâ, but to enable him to be dealt with, for all purposes of penal discipline, in the colony in which he was landed, in the same manner as if it were the colony to which he was sentenced. Will it be contended that all acts of transportation sanctioned by colonial authority, up to the present time, are void, and that all convicts now suffering in penal settlements, under colonial sentences, are entitled to their discharge? The manner in which the prisoner is to be dealt with on his arrival at Van Diemen's Land, depends on the law in force there. For any thing that appears to this Court, the legislative council, appointed for Van Diemen's Land, under 9 *Geo.* 4, c. 3, may have passed some law, which will provide for his detention there, but this Court has nothing to do with the matter. It has been contended that, as the legislature has declared, by an Indemnity Act, that Lord *Durham* had no power, by his ordinances, to carry transportation into effect

in Bermuda, as being beyond the limits of his jurisdiction, therefore transportation in this case cannot be carried into effect, for the same reason, in Van Diemen's Land. The Bermuda ordinances, however, were passed by a special council with limited powers, and not by the local legislature, under the 31 *Geo.* 3, c. 31. It is admitted that this country will not recognize the penal laws of foreign states. No act of the British Parliament has ever recognized them. But Canada is not a foreign country. It is part of her Majesty's dominions, and the British Parliament has recognized the power of the Canadian legislature to pass laws, authorizing the very punishment which it is now sought to inflict.

Fourth objection.

IV. There has been no irregularity in the conduct of the prisoner's transportation. If transportation is legal, it follows that there must be power to do all that is necessary to carry it into execution. The return states that there were no means of conveying the prisoner directly from Upper Canada to Van Diemen's Land. The executive government, therefore, was called upon to take him from state to state until he arrived at his destination. It has been argued that, if there was any defect in the authority under which any intermediate person, between the governor and the gaoler of Liverpool, held the prisoner, all will fail. But it would have been quite sufficient for the return to have stated the original authority only, and then to have added, that, in the course of carrying his sentence into effect, the prisoner came into the custody of the party making the return, and remained there by virtue of that sentence.

Fifth objection.

V. The last objection to the return is, that the party making it has not set out his warrant, authorizing him to receive the prisoner into his custody, and the other necessary documents. In many cases a warrant is indispensable to justify the detention of a person in custody, as where he has been *committed* for felony; but, if he is detained in *execution* of his sentence, no warrant is requisite. The

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case cited, *Rex* v. *Clerk* (*a*), was a case of commitment. Will it be contended, that the prisoner might have been detained in the ship, until the means for his transmission from the coast of England to Van Diemen's Land had been provided; but that the more humane course of keeping him on shore, in safe custody, was illegal? Even before trial, a warrant is not always necessary; a constable may apprehend a person for felony, without any authority from a magistrate, and to a writ of habeas corpus it would be enough for him to return the truth of the matter. The case cited only shews that, where there is a warrant, there must be a return of the warrant. There may have been no warrant in this case, nor in many other supposable cases; as, for instance, if the prisoners, having suffered shipwreck off the coast of Lancaster, had been saved, and the captain had been drowned, so that any authority in his possession could not be transferred, they might, notwithstanding, be detained in this country until it was convenient to convey them to Van Diemen's Land, and it would be sufficient to return the truth of the matter. It is somewhat inconsistent to complain that the party making the return can know nothing about the matters contained in it, and yet that he has not set out every thing appertaining to them with as much particularity as if they had fallen within his own personal cognizance. The law does not require that every minute detail should be introduced into a return to a habeas corpus. In *Barnes*'s case (*b*), the return stated generally, that he had been imprisoned for taking an anchor, within the jurisdiction of the Court of Admiralty, of the Warden of the Cinque Ports; and to an objection, that the return was not sufficiently precise, *Montague* C. J. answered, "A return differs from other judicial proceedings, and such precise certainty is not required in returns; but it is sufficient if the Court can learn from the return the substance of the matter." In *Rex* v. *Suddis* (*c*) "a writ of habeas corpus had issued to Sir *W. A. Pitt*, go-

(*a*) 1 Salk. 349. (*b*) 2 Roll. Rep. 157. (*c*) 1 East, 306.

vernor of Portsmouth, to bring up the body of *John Suddis*. The return stated that *Suddis* was a gunner in an artillery regiment stationed at Gibraltar; that he had been tried by a court-martial there for receiving stolen goods, had been found guilty, and sentenced to fourteen years transportation to Botany Bay; that in pursuance of his sentence, he had been sent to England, in the custody of Lieutenant *Rogers*, by whom he had been delivered to Sir *W. A. Pitt*, as governor of Portsmouth, to be kept until he should be sent to Botany Bay. In that case, there was no mention of any warrant, yet the return was held good. Nor indeed was any objection taken to the absence of a warrant, though the counsel for the prisoner was *Erskine;* and *Lawrence* J. observed in his judgment, "This is a return to a writ of habeas corpus, made by the person in whose custody the party is placed in execution of his sentence. He cannot be taken to be cognizant of all the proceedings. It is enough that the Court had authority to award such a sentence. He returns the cause for which he detains the party in custody, namely, the judgment of such a Court. This return, I believe, is as much as it has ever been usual to make in such cases."

In *Power's* case (*a*), which has been cited on the other side, the warrant, which was the original authority for the prisoner's detention, appeared on the face of the return to be insufficient; and it may be admitted that, if on the face of the return the original authority, which was the foundation, failed, every thing else would fail also. Yet in that very case Lord *Eldon* C. said, "It would be a strong thing to say that the merits of a committal are to be tried merely by the return to the writ, however erroneous that return may be. If such were the rule, then the person, who makes the return to the writ, would, in fact, by making a return short of the truth, assume to himself the power of discharging a prisoner who may have been properly committed." There the warrant, as stated in the

(*a*) 2 Russ. 583.

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return, was insufficient; yet the Lord Chancellor refused to discharge the prisoner until he had ascertained the contents of the warrant itself.

If the return be insufficient, the prisoner, being under a charge of treason, is not entitled to his discharge.

VI. Even if the return be informal, the Court will not discharge the prisoner. It sufficiently appears, at all events, that he is in custody on a charge of high treason, committed within the dominions of her Majesty; for which, if the statute of the colonial legislature be a nullity, and the conditional pardon a nullity, he is still liable to be tried in England or in Canada. If the condition is void, the pardon is void, and if the prisoner renounce the colonial statute and the pardon, the general law of the realm will prevent his discharge. The Habeas Corpus Act itself (31 *Car.* 2, c. 31, s. 16) provides, "that if any person or persons, at any time resiant in this realm, shall have committed any capital offence in Scotland or Ireland, or any of the islands or foreign plantations of the King, his heirs or successors, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this act; any thing herein contained to the contrary notwithstanding." If, then, this return be quashed, the prisoner may be in the same situation as if he had merely been indicted, but he will be still amenable to justice, and must be remanded. In *Rex* v. *Kimberley* (*a*), the defendant, who had been committed to Wood-street Compter, for feloniously marrying contrary to an Irish act of parliament, was brought up by habeas corpus. A motion was made that he might be discharged or bailed, on the ground that justices of the peace had jurisdiction only as to such offences as are against the laws of England, and are committed in England, and that the Habeas Corpus Act gives no power as to offences in Ireland. *Sed per Curiam*, "It has been done in Colonel *Lundy*'s case (*b*); and in 3 *Keb.* 785 the Court refused to bail a man, committed for a murder in Portugal."

(*a*) 2 Str. 848. (*b*) 2 Vent. 314.

Rex v. *Platt* (*a*) is an authority on the same point. The Courts in Canada would not discharge the prisoner, under the present circumstances, nor will this Court (*b*).

M. D. Hill, in reply. There is no foundation for the doctrine, that the King may, by virtue of his prerogative, commute the punishment of death to that of transportation in cases of high treason. Many authorities will be found against such a doctrine; and by Magna Charta it is expressly provided, that no man should be punished, unless found guilty by his peers, or by the law of the land. But even if the King has such a power, the governor of Canada is not supreme, and it is matter of notoriety that, in all patents, under which governors of colonies are appointed, the power to pardon for treason and murder is excepted. No law could be made in the colony, empowering the governor to send transports into England, and restrain them there, whether it were to be made the terminus or only a stage in their proceeding towards another place; and without the concurrence of the authorities in Van Diemen's Land, or some act of the Imperial Parliament overriding those authorities, such transports could not be taken to Van Diemen's Land. The law, in its utmost extent, could only carry them as near the place of their ultimate destination as conflicting jurisdictions would allow. In this case the governor of Upper Canada has not attempted to extend his authority beyond his own jurisdiction; thenceforward the prisoner had been left to be picked up by any one who might volunteer to convey him on his journey. The arguments for the Crown, to support the legality of his transportation, have been put entirely on a legislative recognition, in the recital of an act of the British Parliament. Such arguments are extremely dangerous; that act stated, that "laws were in force," authorizing transportation from the colonies. If so, where are

(*a*) 1 Leach's Crown Law, 157. 2 D. & R. 411, and *Rex* v. *Marks*,
(*b*) See also *Ex parte Krans*, 3 East, 157.

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they? They might easily have been produced, for they must of course be laws of the imperial legislature. *Rex* v. *Suddis* (*a*) has been referred to as shewing that no warrant for the prisoner's detention need be set out on the return, simply because no objection, on account of the absence of any warrant, had been taken in that case by *Erskine*. Even if such an argument were good, it is to be observed that the Court there supported the return, because it appeared from it that a judgment had been pronounced against the prisoner. *Suddis*, also, it is to be remembered, was a soldier, not entitled to perfect liberty, but was under the control of his officer, and might have been sent from Gibraltar, a military station, to this country, without having committed any offence whatever. In that case, therefore, where a trial had been had, many circumstances might be taken for granted. Here the Court is called upon to take the bare assertion of the gaoler of Liverpool that an indictment has been preferred; that a bill has been found; that a petition has been presented; that a confession of guilt has been made; and that a pardon has been granted and accepted on condition of the prisoner's transportation. The prisoner ought to have been accompanied throughout by a warrant to shew the authority under which he was held in custody; otherwise it might be in the power of the tyrannical master of any vessel, before going into port, to put any one of his crew in irons, and then to deliver him up to any gaoler here, as a person who was under sentence of transportation and in transitu to a penal colony. If the mere delivery was sufficient, there is nothing in the boasted privilege of habeas corpus to protect such a person, however innocent, from transportation to Van Diemen's Land. It is not necessary, at this stage of the proceedings, to notice the argument which has been offered to prove that the prisoner will not be entitled to his discharge, even if the return be deemed insufficient; that question, if it should arise, may be conveniently reserved for a future occasion. *Cur. adv. vult.*

(*a*) 1 East, 306.

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On Monday, Jan. 21, the prisoners were again brought into Court, when Lord DENMAN C. J. delivered the judgment of the Court as follows:—

We are now to pronounce our judgment on the validity of a return to a writ of habeas corpus for bringing up the body of *Randal Wixon*, being in the custody of the keeper of her Majesty's gaol at Liverpool. The writ was issued by Mr. Justice *Littledale*, returnable forthwith before himself, at his chambers in Serjeant's Inn; but the term was so near at hand, that it was thought expedient to hear the argument in the full Court. Every point that could arise upon the facts that appear has been amply discussed, and as some doubt was expressed on the right of my learned brother to issue this writ, we desire to state our deliberate opinion that he has done no more than the law justifies and requires. We deserve herein neither the praise nor the censure that may belong to innovation: we are merely abiding by an established practice. Lord *Coke* indeed, and Lord *Hale* and Lord Chief Baron *Comyn*, as text writers upon this subject, appear to confine to Chancery, which is at all times open—the officina justitiæ—the power of issuing a habeas corpus in time of vacation. But *Tremain*'s Pleas of the Crown contain four precedents of writs in the exact form of that now before us, earlier than 31 *Car.* 2, one as early as the 43rd *Eliz.* *Wilmot*, in his answer to the House of Lords, refers to others anterior to the Habeas Corpus Act, and observes that the great men who framed it would never have left so obvious a defect without remedy. In 1758 he and the judges, consulted by the House of Lords, affirmed this power, and the reforming bill which had been introduced would scarcely have been suffered to fall had it not been in that respect deemed unnecessary. In 1765 then *Blackstone*'s statement is a valuable testimony of the general opinion at that time, and the practice from that period has been uniform. It is also true that in deciding *Crowley*'s case (*a*) Lord *Eldon* doubted the power of

(*a*) 2 Swanst. 1.

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a judge in vacation to issue a habeas corpus, saying there is much good principle for it, but very little practice. That doubt assisted his argument in favour of overruling the solemn decision of Lord *Nottingham* in *Jenkes's* case (*a*); but the passages in his judgment, which occur at p. 65 and p. 68, distinctly prove that he formed his opinion partly on the inconvenience and oppression which might have accrued to the subject if deprived of the means of obtaining a release from imprisonment in time of vacation by a writ sued out in the Court of Chancery. Now the same ill consequences would follow in criminal cases, notwithstanding the power of issuing these writs in vacation by Chancery, unless the judges of the Court of King's Bench have power to decide immediately on the right to restrain a subject of his personal freedom. In favour of the practice we have the authority of Lord *Nottingham* himself, who in his judgment, preserved by Mr. *Swanston*, mentions that precedents of such writs being issued by *Kelynge* C. J. were brought before him. He says indeed that *Rainsford*, then C. J., had refused a habeas corpus to *Jenkes*, but not because he doubted his power to do so. It is far more likely he did not choose to enter into a controversy with the Privy Council, by whom *Jenkes* had been committed. In fact, therefore, there is no decision against this doctrine, and in its favour great authority, principle, necessity, and very early precedents, continued to the present hour.

We proceed then to examine this return; which in substance is, that after the insurrection in Upper Canada was suppressed last year, the legislature authorized a pardon to be granted by the Governor to such persons charged with high treason as should, before arraignment, confess their guilt, and petition for a pardon, on such conditions as should seem fit; that *Wixon* was so charged, and so pardoned, on condition of being transported to Van Diemen's Land; that for want of the means to convey him thither directly, he was first taken to Quebec, in Lower Canada, then em-

(*a*) 6 How. St. Tr. 1189, cited 3 Bl. Comm. 132, and more fully in Lord *Eldon's* Judgment, 2 Swanst. 12.

barked to England, and there kept in safe custody in Liverpool gaol, being a secure and convenient place for the purpose of detaining him, while necessary preparations were made for transporting him in fulfilment of the condition of his pardon. Some general observations are material to be made. The return must necessarily be received as true in all the particulars that appear upon it in the present stage, in which its sufficiency alone is examined. We are sitting as on a demurrer, or a writ of error on the judgment of another Court. We must also bear in mind that the matter for our consideration is not the code by which the law of this country may *require* its ministers to proceed in certain cases, but whether, under the circumstances of this prisoner, he can justly complain that he is injured and has a right to be set free. Obviously there is a broad distinction between the duties which a state may enjoin on persons in authority, for purposes of its own, and the powers of which it may permit the exercise for any lawful purpose. The difficult questions that may arise touching the enforcement in England of foreign laws, are excluded from this case entirely, for Upper Canada is neither a foreign state nor a colony with any peculiar customs. Here are no mala prohibita by virtue of arbitrary enactments; the relation of master and slave is not recognized as legal; but acts of parliament have declared that the law of England, and none other, shall there prevail. The consequence is, that we can take judicial notice of their legal proceedings, can understand the language they employ, and must, according to all former practice, make every reasonable intendment in support of their validity.

Objections to the return answered.

The legislative act, under which the pardon was granted, was however said to be absolutely void, for two inherent vices; first, that by the law of England no man can contract for his own imprisonment. This dictum of Chief Justice *Hobart*, founded on older authorities and on principle, was cited by Mr. *Hargrave* in his celebrated argument in the case of *James Sommersett* (*a*). It made out his point, that even if

(*a*) 20 How. St. Tr. 1.

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the negro had sold his freedom, our law would hold the bargain void; but it really has no application to the case of a man charged with a crime, but permitted by law to confess it before arraignment, and so enabled to obtain a pardon, by which his life is spared, but binding himself to undergo a less severe punishment. The second objection was to the enactment that persons may be pardoned "on such conditions as may seem fit," as if it introduced a power of punishing in a manner unheard of in our procedure, and would legalize even torture and mutilation. But we are of opinion that these barbarous practices are implicitly excluded from the enactment, unless it should actually express them. There is no doubt that transportation was intended, for that mode of punishment is mentioned in the 2nd section of the same act: it appears from former acts passed in Canada to have been in force there; and the 5 *Geo.* 4, c. 84, s. 17, proves the frequency of transporting to the penal settlements for offences committed in certain colonies belonging to her Majesty; while it is notorious that the substitution of that punishment for the loss of life has been constantly, during a long course of years, an acknowledged practice in this country. Another objection, drawn from a different provision of the act, that the pardon was made equivalent to an attainder in respect to property, and therefore could not affect the person, was not much pressed, as this proceeding is in no degree connected with the principles of attainder. Objections were raised to the condition of the pardon, both in respect to the time and the place of transportation. The time is fourteen years, to be reckoned from *the arrival of the party in* Van Diemen's Land, thus depending on accident, or perhaps postponed by wilful delay, and void for the uncertainty. The answer given at the bar appears to us satisfactory; that as the transportation may be for term of life, it may à fortiori be for *any* shorter period. It was then said that the power to receive the convict at Van Diemen's Land, the place of his destination, ought to appear in the letters-patent granting the pardon. We do not

think it necessary. Her Majesty has power by law to make that settlement a receptacle for persons transported under sentence, or after a commutation of their punishment; and we can have no difficulty in presuming that all due preparations and provisions for that purpose have been made. The return was challenged for the want of every one of the numerous documents whence the right to imprison was inferred. The indictment for treason, it was contended, ought to have been recited, if not set forth in terms; the petition, the confession, the pardon, the assent, though that indeed is not required by the act. We were told that it was our duty to inspect these papers, and not receive a merely general description from the party imprisoning, that we might judge for ourselves whether the description was correct, and whether they really conferred the authority ascribed to them. To this manifold objection one answer must serve; the fact is stated to the Court upon the return, and we are bound to receive it as true. The party who makes the return has probably never seen the documents, but at his peril places his confidence in the captain who brought the prisoners from Canada, or in some other person; but he is bound by the assertion which he makes on their credit, and their truth may be questioned in any ulterior proceeding which it may be competent to the party to adopt. The last head of objection is, that the authority to transmit the prisoner to the various custodies in which he has successively been placed does not properly appear. The treason was committed in Upper Canada, and there confession was made, and the conditional pardon granted. How then, it is asked, could the Governor of Lower Canada be justified in receiving him, and in transmitting him to England? and how can the gaoler of Liverpool restrain his person in this country?—the more especially as Sir *John Colborne*'s letters-patent are directed in terms to "such person in England as may be lawfully authorized to receive him," and no warrant is even pretended to have been directed to the gaoler of Liverpool, nor does he even allege himself to be a person

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answering that designation. We answer, that, as soon as the conditional pardon had been granted on the prisoner's petition, the crown had a right to enforce the condition, and to take all necessary steps for that purpose. The circumstances confer the authority, and no warrant could enlarge it. Sir *John Colborne*, whose letters-patent are addressed to persons having authority to receive, had in himself no more authority to receive than the person who now detains the prisoner. As it is physically impossible to embark at once for Van Diemen's Land from Upper Canada, in every intermediate territory where the prisoner was confined in the necessary performance of the condition to which he had lawfully bound himself, he was lawfully confined. And the *5 Geo.* 4, in the section before quoted, shows that transports from the colony on commuted sentences had been habitually received in England in their passage to the penal settlements. The result is, that the person making this return is justified in rendering his assistance to the captain of the vessel, which has brought the prisoner from Lower Canada, in detaining him, and to such other person as may be employed to carry him to Van Diemen's Land; and that the prisoner must be remanded to his custody.

We have selected the case open to the most numerous objections for our first judgment. Eight others, viz., *J. G. Parker*, *F. Malcolm*, *R. Walker*, *P. Bedford*, *L. Watson*, *J. Brown*, *J. Anderson*, and *W. Alves*, must be disposed of in the same manner, for substantially the same reasons. Three, viz., *J. Grant*, *L. W. Miller*, and *W. Reynolds*, have not been pardoned under the legislative act, but according to the ordinary practice, as stated in the return, after being *duly convicted* at a court of sessions of oyer and terminer, at Niagara, in Upper Canada,—one of them of *treason*, the other two of *felony*. We have carefully considered whether these allegations are sufficient; and, on the principles already stated, we think they are. On this point we rely on the principle laid down in *Barnes'* case(*a*)—see also *Hutchins* v. *Player*(*b*)—that returns to the writ of

(*a*) 2 Rol. R. 157. (*b*) Bridgman's Rep. 293.

habeas corpus do not require minute correctness if the substance of the facts is stated; and on the precedent acted upon in *Rex* v. *Suddis* (*a*), where similar allegations, but still looser, were sanctioned and held good. These then must also be remanded.

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Prisoners remanded.

M. D. Hill then moved for a rule, calling upon *Batcheldor* to shew cause why he should not verify his return by affidavit.

He moved also for an attachment against *Batcheldor*, for contempt in making a false return, upon an affidavit made by a clerk to the attornies for the prisoners, which alleged that *Batcheldor* had shewn him the letters-patent of Sir *J. Colborne* to *Morton*, the master of the "Captain Ross," as the warrant (*b*) under which he (*Batcheldor*) held the prisoners in custody, and stated that the return would consist simply of such warrant; that *Batcheldor* had shewn him the return also, as originally prepared in *Watson*'s case; that such return did simply set out such warrant. The affidavit then stated that, although the name of *Watson* occurred in the recital of the warrant, it was wholly omitted in the mandatory part of it.

With regard to the first part of the motion, the writ of habeas corpus will obviously be rendered illusory, if the judges, who thereby demand to know the causes of a party's imprisonment, are compelled to rest satisfied with the unsupported statement of the party making a return. In the present case *Batcheldor* professes to speak from the information of another,—that person being the master of the vessel which had conveyed the prisoners to England, who might, from motives of private pique, have got them on board by stratagem, and after leaving them with the gaoler of Liverpool, to whom he never exhibited the documents referred to in the return, and to whom he could tell any

(*a*) 1 East, 306.

(*b*) See the concluding part of the return in the case of *Grant*. All the other returns were the same in this respect, referring to Sir *J. Colborne*'s letters-patent as the authority under which the prisoners were sent to England.

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story that would be likely to answer the purpose, have sailed back to America. The notion that a return must be taken as conclusive of the truth of all facts stated in it, is of modern origin. In *Hutchins* v. *Player* (*a*), Sir *Orlando Bridgman* refers to *Andrew Devine*'s case, 34 *Hen.* 6, where a habeas corpus issued out of Chancery to the Mayor and Sheriffs of London, to bring *Devine*'s body before the King in Chancery. They returned that he had been convicted of exercising the trade of a broker without admission, contrary to the customs and ordinances of the city of London. "To this he makes answer; and they reply, and pray that he may be remanded. The Lord-Chancellor, by the advice of the two justices *Fortescue* and *Prisot*, *Asheton* J., and the rest of the justices, and having heard the reasons, evidences and allegations on both sides, and the charters, liberties, statutes, records, and ordinances of the city in that behalf, ex antiquo fact. et approbat., did adjudge that he should be remanded, in affirmance of the said liberties, statutes and ordinances. This precedent," says Sir *O. Bridgman*, "I shall make use of anon to prove the custom; but I urge it now only to this purpose, to shew that the Court did make use of matter *dehors* to satisfy themselves of the cause of the return." So, in Sir *Wm. Chancey*'s *case* (*b*), it appeared that he had been imprisoned by four commissioners of the High Commission Court, established under 1 *Eliz.* c. 1. He was discharged on return to a habeas corpus, on a ground not appearing on the face of the return (*c*), namely, that the commission did not empower four commissioners to act. *Gardener*'s case (*d*), *Swallow* v. *Le City de London* (*e*), and particularly *Hutchins* v. *Player* (*a*), in which *Devine*'s case is stated, are authorities that the Court will look out of the

(*a*) Bridgman's Judgments, 274—288.

(*b*) 12 Rep. 82.

(*c*) The commissioners' warrant appeared on the face of the return. It was signed by four of them only, after reciting that the commission was directed to them and to others also, and it did not state that four only had any power to act. See the Judgment of *Coleridge* J. *post*, 562.

(*d*) Cro. Eliz. 821; *S. C.* as *St. John*'s case, 5 Rep. 71 b.

(*e*) 1 Sid. 287.

return, and investigate its truth, and that they will admit it to be pleaded to. It is said indeed that the plea must not traverse the return, but can only be in confession and avoidance. Such a plea, however, would not, it is apprehended, be conclusive; it might be traversed; and if so, why should the return be privileged and not traversable? The return states that *Watson* obtained a conditional pardon: suppose a plea to confess that, and to avoid it by averring that an absolute pardon was granted afterwards: the onus would lie on *Watson* to prove it. Suppose then, on the other hand, his plea simply to traverse the condition of the pardon; surely the onus would be cast on the gaoler, who asserts the affirmative of the issue, to prove it. Why should pleadings, in which liberty is at issue, be so exempted from the ordinary rules of evidence, as to relieve the party pleading in restraint of liberty from the onus that would be cast upon him in an issue as to property of merely nominal value? If the return can be looked at only as on demurrer, and its statements of fact cannot be controverted, or if they may be controverted, but the party traversing them is bound to prove a negative, namely, that he is not legally in confinement,—what is to hinder one man from seizing another, and selling him into slavery, if he can get a special pleader to make a return good upon the face of it? An action of false imprisonment would be no protection to a man snatched away to a distant country, where he might lose all clue to the discovery of his oppressor. In 1757 occurred the cases of the men impressed and confined in the Savoy, under 18 *Geo.* 2, c. 10; cases which excited great attention, and in the following year were made the ground for introducing into parliament a bill (already referred to during this argument) for rendering the writ of habeas corpus more effectual. An account of these cases, from *Dodson*'s Life of Mr. Justice *Foster*, is to be found in the notes to the case of *Sommersett* the negro (*a*), together with the following opinion of that learned judge, privately, but delibe-

(*a*) 20 How. State Trials, Addenda, 1374.

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rately expressed in writing:—"He" (the prisoner) "is taken from the Exchange, or from behind his counter, no matter whence, and thence to the Savoy, or aboard a tender; and if his friends happen to have time enough to procure a habeas corpus, a sufficient return to the writ is immediately made; (there are precedents enough in the Crown Office, and they are soon copied;) and the man is sent away, in due form of law, to take his chance, for some years perhaps, amidst the perils of the sea and the disasters of war. But it is said that he is not without remedy. What remedy? An action against a man perhaps not worth a groat. But how responsible soever the officer may be, what satisfaction in damages is equal to the injury? or, if that were possibly to be had, what becomes of the action if the plaintiff should be knocked on the head in the service? Why truly moritur cum personâ. In short, he hath, in this view of the case, no remedy, unless you give him what I call the specific remedy,—a right to controvert the truth of the return before it is too late."

In *Rex* v. *White* (*a*), Trin. T. 19th *Geo.* 2, this course was pursued. A habeas corpus was directed to Major *White*, of the Tower of London, to bring up the body of *Reynolds*. *White* returned that *Reynolds* was committed to his custody as a person impressed under 18 *Geo.* 2, c. 10. After the writ and return had been filed, a rule was obtained, upon affidavits, that the commissioners for putting the act in execution should shew cause why *Reynolds* should not be discharged. Affidavits were read on both sides; and the Court said, "that although it is not usual to enter into the truth of facts set forth in the return to a habeas corpus, yet in this case, as the party suing the writ hath no other remedy, it may be done; and that if *Reynolds* is not within the description of the act, the commissioners have no sort of jurisdiction over him; the whole proceeding is a mere nullity, as coram non judice." [*Coleridge* J. Does it appear on which side affidavits were first filed?]

(*a*) 20 How. State Trials, Addenda, 1376, n.

It does not appear. On the introduction of the above-mentioned bill, after it had passed the Commons to the House of Lords, several questions on the subject of habeas corpus were submitted by the lords to the judges (*a*). The tenth among those questions was the following:—"Whether, in all cases whatsoever, the judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought before them, although it should appear most manifestly to the judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?" Ten of the judges delivered their opinions on this question, and seven of them were of opinion that they were not so bound by the return. *Wilmot* J., who was one of that majority of seven, and whose opinions are to be found more at length in his "Judgments and Opinions," p. 107, and *Parker* C. B., who was also of that majority, certainly delivered qualified opinions, namely, that by the "clearest and most undoubted proof" they meant the verdict of a jury, or judgment on demurrer or otherwise, in an action for a false return. But they were neither of them probably aware of the cases cited from *Bridgman*'s Judgments, which have only recently (in 1823) been published; and the House of Lords threw out the bill, because, in all probability, they thought it unnecessary, as the existing state of the law, according to the views of a majority of the judges, allowed the return to be controverted.

In *Goldswain*'s case (*b*) (18 *Geo.* 3,) a bargeman protected by the Navy Board, while carrying timber to the King's docks had been impressed; and *Gould* J. observed on that occasion, "I do not conceive that either the Court or the party are concluded by the return of the habeas corpus, but may plead to it any special matter necessary to regain

(*a*) See 4 Bac. Abr. 140, 7th ed. title Hab. Corp. (B) 13, and 15 Parl. Hist. 898.

(*b*) 2 W. Bla. 1207.

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his liberty. *St. John's* case (*a*) was a case of this kind." Mr. *Hargrave*, in his Jurisconsult Exercitations (*b*), has printed his argument in the *Negro Sommersett's* case, with notes, in which is to be found the following passage: "In the habeas corpus, the return cannot be contested by pleading against the truth of it, and, consequently on a habeas corpus, the question of liberty cannot go to a jury for trial; though indeed the party making a false return is liable to an action for damages, and punishable by the Court for a contempt; and the Court will hear affidavits against the truth of the return, and, if not satisfied with it, restore the party to his liberty." One part of the above passage is adverse to the right now claimed on behalf of the prisoners, to controvert the return in pleading; but Mr. *Hargrave* could hardly have been cognisant of the authorities already cited in favour of that right.

An argument against the right to controvert the return may be derived from the 56 *Geo.* 3, c. 100. That act recites, that it was desirable to extend the remedy by habeas corpus under 31 *Car.* 2, c. 2, and that the former act applied only to cases of commitment for criminal or supposed criminal matter, and then provides for cases where any person should be confined otherwise than for some criminal or supposed criminal matter, or for debt, or by process in any civil suit. It then enacts, (s. 3,) "that in all cases provided for by this act, although the return to any writ of habeas corpus shall be good and sufficient in law, it shall be lawful for the justice or baron, before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return, by affidavit or by affirmation (in cases where an affirmation is allowed by law), and to do therein as to justice shall appertain; and if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him, on such examination, whether the material facts set forth in the said return, or any of them, be true or not, in such

(*a*) Cro. Eliz. 821; *S. C.* 5 Rep. 71 b. (*b*) Vol. i. p. 22, n.

case it shall and may be lawful for the said justice or baron to let to bail the said person so confined or restrained," &c. It may be argued perhaps that, as this statute provided for an examination into the truth of a return in other than criminal cases, and as the present is a criminal case, the rule *expressio unius*, &c. applies, and that the statute therefore is not available on the present occasion. But the statute is to be construed in favour of liberty, and it must be remembered, that the meaning of the words "criminal or supposed criminal matter," in 31 *Car.* 2, c. 2, is limited in the third section by the exception "other than persons convict or in execution by legal process." The two statutes then being in *pari materiâ*, the words "criminal or supposed criminal matter," must be taken in the latter statute to be used in the same limited sense as in the former, so as not to include persons convict or in execution by legal process, but such persons only as are committed to await their trial. The prisoners, therefore, are within its remedial provisions, and have a right to the benefit of any examination to which the returns are thereby rendered liable. The main argument, however, relied upon is, that the early authorities shew that the prisoners are entitled to this benefit at common law.

Of late years it has been the practice of the Courts, whenever the liberty of the subject is concerned, in cases where they have the power to investigate facts by a tedious and formal process, to interfere by virtue of their summary jurisdiction, so as to grant a speedier relief. Thus a party having privilege, whether of Court or of Parliament, was formerly, if arrested, obliged to have recourse to his writ of privilege; so a feme covert was formerly obliged to plead her coverture. Now, however, in these and other cases, the parties in confinement may obtain redress upon motion. On this account it is that many years have elapsed since a plea has been actually put in to a return to a writ of habeas corpus, and it has been more usual, as in

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Rex v. *Marks* (*a*), to resort to affidavits. If then the Court may examine into the truth of a return, whether upon plea, according to the ancient practice, or upon affidavit, according to the modern practice, it cannot be contended that the particular course of inquiry adopted by the Court, for the convenience of parties, can affect that which is a maxim of reason and of law, that the onus of proof is always on him who maintains any thing in derogation of the freedom or property of another. Where, therefore, such onus would necessarily, by the rules of pleading, be cast upon the party making a return, if the return were pleaded to, the circumstance that the procedure, by pleading to a return, has fallen into disuse, will not shift that onus. The return must still be proved, whether it be opposed by plea or affidavit; the prisoner cannot have to shew negatively that there is no just excuse for his imprisonment. In the former argument it was said that it could not be necessary for a return to set out the documents which would justify the detention of persons under sentence of transportation, for it might be that all such documents had been lost in shipwreck. The same mischance, however, might destroy all documents by which a prisoner might be able to shew that he was detained unjustly. If the return had been traversed, as in *Devine's* case (*b*), the course of pleading would have thrown it upon Mr. *Batcheldor* to prove his return. It is right, therefore, that he should now be called upon to verify it by affidavit. With regard to that part of this motion which relates to the attachment of *Batcheldor* for a contempt, it is sufficient to observe, that the name of *Leonard Watson* is not to be found in the operative part of the warrant. His return is therefore false; he has therein made various statements, which he could not know to be true; but in this particular instance he has made a statement which he must have known to be false.

(*a*) 3 East, 157. (*b*) Bridgman's Judgments, 288.

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Lord DENMAN C.J.—Upon the return, which was read some days ago, in the case of *Watson*, I understand Mr. *Hill* to make two motions, or rather one motion having in view two distinct objects. In the first place, Mr. *Hill* contends that the return, as it now stands, ought to be verified by affidavit; and, in the second place, he produces an affidavit, on which he founds an application for the attachment of Mr. *Batcheldor* for a contempt of this Court in making such a return, which was false within his own knowledge. With regard to the first branch of the motion there seems to be no sort of authority for saying, that in any instance whatever it has been held necessary to support a return to a writ of habeas corpus by affidavit; and I do not find that in practice it has ever been done. It appears to me, therefore, that we should not be justified in introducing any new practice, or in saying that now, for the first time, it is necessary that the party who makes the return should verify it on oath. The law provides certain other means to secure the truth of the return, and if they should be found insufficient, it is a great misfortune for those whom the law intended to protect, but this will not authorize us in making any innovation upon it. With regard to the other part of the motion, it appears that the warrant of Sir *J. Colborne* has been misrepresented to the Court. I must own that, in my opinion, wherever the Court has the means of ascertaining the truth, it ought to be extremely careful in requiring that the truth should be fully stated. Without entering into the question whether the warrant, which has been misrepresented, was material to justify Mr. *Batcheldor* in detaining the prisoner, or whether it may not be inferred, from the judgment delivered this morning, that the warrant might have been dispensed with altogether, (for I think that no such minute inquiry ought to be made,) it is sufficient to say that there is an untruth in the return, and that there is therefore a primâ facie case for us to call upon the party who has made the untrue statement to account for his having done so.

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LITTLEDALE J.—A person imprisoned unjustly has two remedies; he may either bring an action for false imprisonment against the party who has him in custody, or he may apply to a judge for a writ of habeas corpus. If he brings an action, the party detaining him would be bound in his plea to set out specially the grounds of the detention, and to prove all the facts alleged by him which should be put in issue. But the gaoler of Liverpool is not defendant in such an action, so as to be in the situation which would compel him to prove the truth of every cause assigned for the prisoner's detention. The prisoner has applied in a summary way for relief by habeas corpus. The writ has been granted, and calls upon the gaoler to bring his body before the Court, and to account for holding him in custody; and it has been held to be not material in this form of proceeding to specify all matters, justifying the detention, fully and minutely, as in an action for false imprisonment. But, it is said, the return should have been supported by affidavit. I do not find any authority for such a practice. Mr. *Hill* argues from other proceedings with regard to habeas corpus, and says that, if the principle of them is followed up, the gaoler ought to prove his return by affidavit. There is no precedent for this, and we cannot deviate from the usual course so as to require that to be done in this instance which has never been done before. With regard to the other point, it appears that the warrant was within the knowledge of the gaoler, and being the document under which he was to detain the prisoners, he must be presumed to have looked over it, and should therefore be called upon to account for his misrepresentation of it.

WILLIAMS J.—The judgment already pronounced may be offered as an answer to that part of this motion which requires the return to be fortified in the first instance by affidavit, because the Court has decided that the return primâ facie imports verity. In many of the cases cited in

the course of this argument, and in *Ex parte Krans* (*a*), which, I believe, has not been cited, the Court considered the effect of the return itself. If it primâ facie imports verity, it follows that, until it is impeached, no evidence can be required in support of it.

COLERIDGE J.—I am entirely of the same opinion upon both points. With regard to the latter part of this application, I think it unnecessary to say more than that as it is merely a rule nisi which has been granted; the Court abstains cautiously from prejudging the question, and proceeds simply on the principle, that wherever a public officer has made a return, which primâ facie appears untrue, it is incumbent upon him to account for it and explain why he has so dealt with the Court. The other point is, that it is necessary for Mr. *Batcheldor*, in the first instance, to support his return by affidavit. A great deal was said in the first part of Mr. *Hill*'s argument, by way of general observation, on the liberty of the subject, and on the illusory nature of the writ of habeas corpus, unless we sustain his argument. With regard to that I will merely say that, on an examination of the history of England, it will be found, I apprehend, that that judge does best for the liberty of the subject who does not indulge in speculations of his own, as to what will be best for the people to the extent of straining the law beyond its limits, as marked out by the authorities, but who adheres to the law, as he finds it written, and as he finds it has been acted upon, however defective it may be; because, if it be defective, the enforcement of it is sure to lead to its alteration in the regular and constitutional mode. Mr. *Hill* has argued the matter with great learning, but the authorities cited do not sanction his position, which is, not that the truth of the return may in any stage be controverted, either by plea or affidavit, but that the return should be supported by affidavit in the first instance. There is not a single case from the time of *Henry* 6, down to Mr. *Har-*

(*a*) 1 B. & C. 258; *S.C.* 2 D. & R. 411.

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grave, which bears out such a doctrine. In Sir *W. Chancey*'s case (*a*), it does not appear to me that any thing more was decided than that the return was informal on the face of it; and even if that were not so, it will be found, I apprehend, that cases of privilege may stand on a different footing from ordinary cases, and that, where the Court sees that any of its officers, or any of its privileges, have been dealt with unfairly, it may ex officio institute an inquiry of its own. The great current of authorities is the other way, but perhaps in some of the earlier cases a party has been allowed to controvert the truth of the return by plea, and in the later cases, the practice of filing affidavits with the same object may have been allowed. Now Sir *Michael Foster* is to be taken as a strong authority on this point. It is well known what his opinions were, and if he does not go beyond this, that a party may file affidavits for the purpose of controverting the return—if he does not go on to say that it is incumbent on the party making the return to support it by affidavits, in the first instance, it must be taken, I think, that he had not discovered any authority for the latter position. Thus stands the case upon the authorities, but Mr. *Hill* says that justice requires us to shift it on the other side. I think the Court cannot proceed to that extent, and that there is no ground for granting the first part of this application.

Rule, calling upon Mr. *Batcheldor* to verify his return, refused.

Rule nisi granted for an attachment.

Sir *J. Campbell* A. G., Sir *R. M. Rolfe* S. G., Sir *F. Pollock*, and *Wightman* (Jan. 23,) shewed cause, upon several affidavits, against the rule for the attachment.

Mr. *Batcheldor* made an affidavit that he received the prisoners from *Morton*, who stated that they were state prisoners, brought by him from Canada to England, with a

(*a*) 12 Rep. 82.

view to their being transported; that he (*Batcheldor*) received them by the directions of the mayor of Liverpool and other magistrates of that town; that the names of the prisoners were called over by *Morton* on delivering them into deponent's custody, and that the name of *Watson* was among them; that no warrant was then delivered to him, but that in the course of the same day he received a warrant from the town-clerk, appearing to be under the hand of Sir *J. Colborne*, and under the seal of the province of Lower Canada, and that the deponent again left the warrant for the use of the town-clerk in his communications with government respecting the prisoners, and that, though the deponent had occasional possession of the warrant afterwards, it was for the most part in the custody of the town-clerk, from whom he finally received it the night before coming to London with the prisoners; that on his arrival he left it, with other papers, according to directions given him, with the London agents of the town-clerk; that on the 14th January he signed certain returns prepared by counsel, and was not aware, until after such returns had been filed, that *Watson*'s name did not occur in the mandatory part of the warrant, and that the return originally prepared, as mentioned in the affidavit for the prisoners, was not withdrawn with any intention of keeping back from the Court the terms of the warrant. Mr. *Blunt*, clerk in the office of the secretary of state for the colonies, also made an affidavit, that a despatch had been received at the Colonial Office on the 18th December, from the governor of Upper Canada, containing a list of certain convicts, who had been engaged in the late rebellion, and pardoned on condition of transportation, and that in such list was contained the name of *Watson*, as well as that of the other persons mentioned in Sir *J. Colborne*'s warrant; that *Watson* was described in the list as one of the prisoners transported for life, and that deponent believed *Watson*'s name was omitted in the mandatory part of the warrant by a clerical mistake. Deponent also verified a parchment writing, purporting to be the par-

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don granted to *Watson*, to be sealed with the seal of the province of Upper Canada, and to be signed by the governor of that province. A further affidavit was made by the solicitor to the Treasury, which stated that instructions were sent to counsel to prepare the draft returns; that such instructions consisted, among other things, of the list of prisoners, charters of pardons, and other documents, received from Canada, and a copy of the warrant; that he was not aware that *Watson's* name occurred in the recital only of such warrant; that a draft return in one of each class of cases was prepared by the counsel for the crown, one in the case of *Finlay Malcolm*, and the other in the case of *John Grant*, which were used as precedents for the rest, and that the drafts of the other returns were copied from those prepared, and the names of the other prisoners were inserted in such drafts, varied only as to the statement of the Courts in which indictments had been preferred, and of the conditions of their respective pardons; that deponent was not aware that *Watson's* name was omitted in the mandatory part of the warrant, and that the draft of the original return was considered by counsel to be incorrect, who thought it right that another return should be prepared, setting out truly all the circumstances, but that it was not only unnecessary, but would be improper, to state all the documents at length upon such returns.

It was contended upon these affidavits that the rule must be discharged, as the return had been impeached in one particular only, the mistatement with respect to which was obviously not wilful, and the return originally prepared had been withdrawn, because it was not true that the prisoners were detained merely on the warrant of Sir *J. Colborne*, which in law was spent on their reaching Liverpool. It was also contended that, according to *Rex* v. *Suddis* (*a*), and *Ex parte Krans* (*b*), and the judgment delivered in the present case, the gaoler would have been justified in detaining the

(*a*) 1 East, 306. (*b*) 1 B. & C. 258; *S. C.* 2 D. & R. 411.

prisoners without any warrant at all, so that it was immaterial, and might have been passed by altogether. It was also prayed that the return might be amended, by omitting the averment respecting the warrant.

M. D. Hill, Falconer, Roebuck and *Fry*, contrà, contended that the warrant could not be immaterial, and cited *Rich* v. *Doughty* (*a*), *Newsome* v. *Bowyer* (*b*), and *Anonymous* (*c*), to shew that the transportation of the prisoners was illegal. They also contended that the return having been shewn to be false in one important particular, was deprived of credit altogether, and must be quashed.

Sir *J. Campbell* A. G. replied upon the cases cited, and added that he was not prepared to admit that the return could be traversed, although it might be confessed and avoided.

Lord DENMAN C. J.—This is a motion for an attachment against Mr. *Batcheldor*, the gaoler of Liverpool, who, to a writ of habeas corpus, has made a return, by which he justifies himself for keeping in custody the body of *Leonard Watson*. The attachment was moved for on the ground that Mr. *Batcheldor* has committed a contempt of this Court, in falsely setting out the warrant under which he received the prisoner. I agree that if he had been guilty of wilful falsehood he would be deserving of severe punishment, and that there has been in this matter a degree of culpable neglect manifested, which we cannot view without displeasure. It is undoubtedly incorrect to say that the letters-patent of Sir *J. Colborne*, in the mandatory part of them, required the captain of the vessel to convey *Watson* from Quebec to England. In the first place, I do not think that the party making this return was free from blame in receiving into his custody a prisoner whom he was not

(*a*) 3 Salk. 149.
(*b*) 3 P. Wms. 37.
(*c*) Comb. 16.

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thereby entitled to receive; he ought to have been thoroughly satisfied of his authority before he ventured to restrain another of his liberty. In criminal proceedings, a mistake of this kind might be attended with the most dreadful consequences; and the Court thinks that where any man is entrusted with an office, which controls the liberty of his fellow-subjects, he ought to be most scrupulous, and to beware of acting on any occasion without the clearest authority. But it is not for improperly detaining the prisoner that we are asked to punish Mr. *Batcheldor*, but for having trifled with the Court and with justice, by making a wilfully untrue return. Whether the warrant was material or not is by no means decisive of the question whether he is chargeable with a contempt in misrepresenting that warrant. But the affidavits of *Batcheldor* and others, which have been read to the Court, shew in what way the mistake occurred; and I must say that it is impossible to impute to him the offence of treating the Court with contempt, by making a wilfully false return. I think he ought to have made himself more sure, but at the same time, when there was shewn him a long list of names set forth in the introductory part of the warrant, and he found the name of *Watson* in the number, it seems impossible to say that he might not have overlooked the omission of his name in the mandatory part of it. There has however been neglect in some quarter or another, which cannot be passed over without blame; some person, at all events, should have compared one document with another, so as to be satisfied that the return gave a correct account of the warrant; and the Court had a right to expect that no document should be laid before it, stating that *Watson* was doomed in Canada to be imprisoned in this country, unless some one was prepared to pledge his responsibility that the warrant of Sir *J. Colborne* did contain such a mandate. As to the materiality of the warrant, the Court, on Monday last, said that the warrant was not material to justify the detention of the prisoner, and we do not think it necessary to enter into any argument in defence of

a judgment deliberately given after anxious consideration, and under a deep sense of our responsibility to the country. It is also unnecessary to consider what further proceedings the prisoners may be entitled to take; I neither assent to nor dissent from any of the propositions laid down on the subject. I am by no means prepared to say, if *Watson*, or any of these men, had pledged his oath that any part of these returns was not true, whether he could make it the foundation of any proceeding to punish for wilful impropriety or not, or whether a foundation of any proceeding to quash the returns or not. I am not prepared to say that, if the falsehood of the returns were made in any degree probable before us, we should not be induced to afford an opportunity of having them distinctly proved, and I think therefore that the writ of habeas corpus should not have been treated as if it were a weapon altogether powerless for the protection of the subject, or as if the judges of the land had been guilty of some fraud and collusion in putting that forward as a real protection, which is said to turn out to be nothing but a subject of undeserved panegyric. It appears to me that, even if the remedy had failed in a case of this peculiar kind, for which it is not likely that we should find any precedent, still the provisions made by the law for the liberty of the subject, have been found for ages effectual to an extent never known in any other country, through the medium of the summary right to the writ of habeas corpus. And even in this case, where there is before us a statement, to which I for one give entire credence, of legal proceedings which authorize *Watson's* imprisonment, I am not prepared to say that, if any part of such proceedings could be impeached by him as untrue, there should not be full inquiry, and the means afforded him of making the truth appear. As to the amendment, it clearly follows, from what I have said, that it is fit to be made, not for the purpose of varying the nature of the case, because the return was, in my opinion, sufficient without it, but on the ground on which we granted this rule, that it is not fit

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and decent that any falsehood should appear on the face of the records of the Court.

LITTLEDALE, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

Tuesday, January 15th.

Devise of real and personal estate to trustees to permit testator's daughter, for her life, to take the rents &c., and from and after her decease the premises were given to such of her children as she then had or might have; if a son or sons, at his or their ages of twenty-three, and if a daughter or daughters, at his or their ages of twenty-one years, in fee, as tenants in common; and in case of the death of any child or children under the respective ages, the share to go to the survivors; in case his daughter should have only one child, if a son, that should live to the age of twenty-three, and if a daughter, that should live to the age of twenty-one, the whole to such child; until his grand-children should attain such ages as aforesaid, the rents to be applied for their maintenance by the trustees; in case such grand-children should all die under age, devise over:—Held, that they took vested interests, and that therefore the devise was not void for remoteness.

DOE, on the demise of DOLLEY, *v.* WARD and others.

SPECIAL case for the opinion of the Court, under 3 & 4 *Will.* 4, c. 42. The case stated that *Thomas Dolley*, being seised in fee of the freehold hereditaments, and possessed of the leasehold houses and other personal estate, which are the subjects of the devise and bequest set forth, on the 12th June, 1819, made his will, whereby, after disposing of certain freehold and leasehold estates in favour of his eldest son, the lessor of the plaintiff and his children, he devised as follows:

"I give to the said *Thomas Challis* and *John Brogden* all those my five freehold houses in Harp Court, numbered &c., nine freehold houses in Black Horse Court, numbered &c., and my leasehold house No. 3, Crane Court, Fleet Street, with all rights and appurtenances &c., also ten shares in the Eagle Insurance, London, to hold all the said last-mentioned freehold and leasehold premises, and Eagle Insurance shares, unto the said *Thomas Challis* and *John Brogden*, their heirs, executors, administrators and assigns, according to the nature thereof respectively, during the natural life of my daughter *Sarah Ward*, upon trust that they, my said trustees, or the survivor of them, his heirs, executors and administrators, do pay, or permit my said

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daughter *Sarah Ward*, from the quarter day next after my decease, to receive and take the rents, issues, interest and annual profits thereof respectively, for and during the term of her natural life, to and for her own sole and separate use only, independent of the debts, control or engagements of her present or any future husband, if my estate and interest in the leasehold part so long continue. And I declare that her receipts alone shall only be good discharges for such rents, profits and interest, she my said daughter keeping the said premises in good repair, and the buildings insured from loss or damage by fire, and likewise paying the ground-rent and performing all the covenants in the leases of the leasehold part. And from and after the decease of my said daughter *Sarah Ward*, I give the said last-mentioned freehold and leasehold premises and Eagle shares *unto such of her children as she now has or may have; if a son or sons, at his or their age or ages of twenty-three years, and if a daughter or daughters, at her or their age or ages of twenty-one years*, their respective heirs, executors, administrators and assigns, according to the nature thereof as tenants in common; and in case of the death of any child or children of her my said daughter, if a son or sons, under the age of twenty-three years, and a daughter or daughters under the age of twenty-one years, the share or shares of each such child, son or daughter, so dying, to go to the survivor of such child and children, being a son or sons, on his or their attaining the said age of twenty-three years; and if a daughter or daughters, on their attaining the age of twenty-one years, and their heirs, executors, administrators and assigns, in equal shares, as tenants in common; and in case my said last-named daughter has only one child, if a son, that shall live to the age of twenty-three years, and if a daughter, that shall live to the age of twenty-one years, I give all the said last-mentioned premises and Eagle shares unto such only child, so attaining such age, his or her heirs, executors, administrators and assigns, for ever, or during my estate in the leasehold part, and direct that the rents,

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issues, interest and annual produce, shall, until my said grand-children attain such ages as aforesaid, be paid and applied for and towards their maintenance and education." And in case all the children of his said daughter should die under the age, then he gave the property to his other children for their lives, with similar limitations over to their children.

The will contains no other specific devise or bequest, exclusively applicable to the said hereditaments and premises, but after certain devises and bequests of other real and personal estate, unto or in favour of *Ann Dolley* and *Elizabeth Maria Dolley*, two other of the said testator's daughters, and their children respectively, it contains a clause in these words, "And in case of the death of all my grand-children, now born or hereafter to be born, if a son or sons under the age of twenty-three years, or if a daughter or daughters under the age of twenty-one years, without leaving any child or children them or any of them surviving, I give all my freehold and leasehold estates, and other property hereinbefore by me given in trust for the use and benefit of my said five children, for their respective lives, with remainders over as before mentioned, unto and equally amongst all the children of my sister *Ann Gwillin*, living at my decease, their respective heirs, executors, administrators and assigns, according to the nature and tenure thereof, as tenants in common.

The testator died in March, 1821, seised and possessed as aforesaid, without having revoked or altered his will, leaving, him surviving, his daughter *Sarah Ward*, and seven children of the said *S. Ward*, the eldest being seventeen years of age.

The lessor of the plaintiff is the only son and heir at law of the testator. From the testator's death until her death, *S. Ward* received the rents of the premises.

In 1830, she died, leaving all her children her surviving, the eldest being twenty-six years of age.

From her death to the present time the houses in Harp

Court and Black Horse Court have been claimed on behalf of her children, and the rents have been received for their benefit.

The question for the opinion of the Court was, whether they or the heir at law were entitled to the said houses.

Sir *W. W. Follett*, for the lessor of the plaintiff (*a*). The point submitted to the Court on behalf of the heir at law is, that the devise over, after the death of *S. Ward*, to her children, "if a son or sons, at his or their ages of twenty-three years, and if a daughter or daughters, at her or their ages of twenty-one years," is void for remoteness. This will depend on two questions; first, whether such devise is confined to such of her children as may be living at testator's death, or extends to all the children of *S. Ward*, who may be born at any time, without reference to the period of the testator's death; and secondly, if it does so extend to all her children, whether they take vested interests before attaining the specified ages. If the devise is to all the children, whensoever born, it is then too remote, unless they take vested interests at their birth, for that part of the devise which relates to the sons exceeds the legal term of limitation, and therefore the whole devise will be void. *Baldwin* v. *Karver* (*b*) shews that the present devise comprises all the children of *S. Ward*. (*Kelly*, for the defendants, admitted this.) Secondly, the children take no interest until the attainment of their respective ages. It will be contended on the other side, that they took vested interests at their birth, but subject to be divested on their dying under the ages stipulated. The material distinction between this and the cases which may be cited for the defendants is, that here the devise is not to individuals by name, but to a class, and that there is no antecedent gift to the children, of which the mere enjoyment is to be postponed

(*a*) Friday, Nov. 16, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*b*) Cowp. 309.

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until they reach certain ages, but the gift is itself limited to them at those ages. The age is coupled with the gift. *Leake* v. *Robinson* (*a*) is exactly in point for the plaintiff; there the gift was of real and personal estate, as here, to trustees upon trust to apply the rents and dividends to the maintenance of *W. R. R.* until he should attain twenty-five, then to permit him to receive the same during his life, and after his death to apply the same to the maintenance of all and every the children of *W. R. R.*, until twenty-five respectively, then upon trust to assign and transfer to such children so attaining twenty-five. Sir *W. Grant* M. R. observes, in giving judgment, "The attainment of twenty-five is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed, for there is no antecedent gift, as there was in the case of *May* v. *Wood* (*b*), of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five." This authority has been followed in *Bull* v. *Pritchard* (*c*), where there was a bequest of leaseholds, "to all and every the child and children of my said daughter, lawfully begotten, or to be begotten, who shall live to attain the age of twenty-three years" &c., and in *Vawdry* v. *Geddes* (*d*). In *Doe* d. *Hunt* v. *Moore* (*e*), under a devise of real estate to *J. M.*, when he attains the age of twenty-one, but in case he should die before he attains that age, then to remain over, the devisee was held to take an immediate vested interest, liable to be divested upon his dying under twenty-one. But there the age was not coupled with the gift itself, but served only to mark the time of enjoyment. And neither in that case nor in *Bromfield* v. *Crowder* (*f*), in which *Boraston's* case (*g*) was cited, nor in *Doe* d. *Roake* v. *Nowell* (*h*), was there any question as to the validity of the devise, on the ground of

(*a*) 2 Mer. 363.
(*b*) 3 Bro. C. C. 471.
(*c*) 1 Russ. 213.
(*d*) 1 Russ. & Myl. 203.
(*e*) 14 East, 601.
(*f*) 1 New Rep. 313.
(*g*) 3 Rep. 19 a.
(*h*) 1 Mau. & S. 327.

remoteness; the devise was at all events good, and the only question was, whether it could take effect before the devisee attained twenty-one, and it was not likely that the testator intended an intestacy in the interim. *Farmer* v. *Francis* (*a*) is also distinguishable, for in that case the devise was of residue, in which case any intention to benefit the heir at law is excluded, and in case of any of the children dying under the age limited, there was no gift over among the surviving children.

Kelly, contrà. The distinction set up between cases where the question was, whether the devise was too remote, and cases where the question was, whether the estate was vested or contingent, is merely verbal. The question, in all of them, was substantially, whether the estate was vested or not, and that was the only question, for if it was vested, no question could have arisen as to the validity of the devise, on the score of remoteness. In *Doe* d. *Hunt* v. *Moore* (*b*), the words of the devise were nearly the same as in the present case. Whether the interest taken by these children is vested must depend on the intention of the testator, to be collected according to certain rules of law, from the language he has used. It can hardly be supposed that he intended his heir, for whom he has amply provided, should take the property in dispute. The inclination of the Courts has always been, in cases of doubt, to hold interests to be vested; *Duffield* v. *Duffield* (*c*). In *Edwards* v. *Hammond* (*d*) a copyholder in borough English surrendered to his eldest son and his heirs, if he lived to the age of twenty-one, provided, and upon condition, that if he died before twenty-one, that then it should remain over. These words, strong as they are, were held not to constitute a condition precedent, but a present devise, defeasible by his not attaining such age. The present devise is to take effect *at* certain

(*a*) 2 Bing. 151.
(*b*) 14 East, 601.
(*c*) 1 Dow & Clark, 311, per *Best* C. J.
(*d*) 3 Lev. 132.

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ages of the devisees. In *Boraston's* case (*a*) it was "*when*" *H.* should come to his age of twenty-one; and in *Farmer* v. *Francis* (*b*), it was "*when and as*" they shall respectively attain, &c. The terms are very similar to those of the present devise. In *Bromfield* v. *Crowder* (*c*), which was affirmed on error in the House of Lords, the terms of the devise were, "*if*" *C.* should live to attain twenty-one, but in case he should die before that age, then to another; yet even there the estate was held to be vested. Here, there is an express gift to the children "*from and after the decease*" of the tenant for life. In *Doe* d. *Roake* v. *Nowell* (*d*), which was decided on the authority of the case last cited, and was affirmed on error in the House of Lords (*e*), the devise was almost identical with the present. The testatrix gave certain freeholds to her nephew, and, on his decease, to and amongst his children lawfully begotten, equally *at* the age of twenty-one, but if only one child should live to attain such age, to such child at the age of twenty-one. The children were there held to take a vested remainder, notwithstanding the circumstance, now relied upon for the first time as material, that the devise was to them as a class, and not as individuals. *Warter* v. *Hutchinson* (*f*) is another authority for the defendants; indeed no common law authority has been cited against them. *Bull* v. *Pritchard* (*g*) was decided by Lord *Gifford* M. R. very shortly after his elevation to the bench, and has not given satisfaction to the profession; the devise applied to personalty only, as to the vesting of which a different rule prevails; and *Farmer* v. *Francis* (*h*) was the only authority brought before the Court to support the vesting of the bequest. *Snow* v. *Poulden* (*i*), and *Bland* v. *Williams* (*k*), are strongly in favour of the de-

(*a*) 3 Rep. 19 a.
(*b*) 2 Bing. 151.
(*c*) 1 New Rep. 313.
(*d*) 1 Mau. & S. 327.
(*e*) *Randoll* v. *Doe* d. *Roake*, 5 Dow, 202.
(*f*) 1 B. & C. 721; *S. C.* 3 D. & R. 58.
(*g*) 1 Russ. 213.
(*h*) 2 Bing. 151.
(*i*) 1 Keen, 186.
(*k*) 3 Myl. & K. 411.

fendants. In the latter case the testator bequeathed the residue of his estate to trustees to pay an annuity to his daughter for life, and from and after her decease to receive the rents of all his estates, and apply the same towards the maintenance of all and every the child or children of his daughter until they should attain twenty-one, and when and as they should attain that age, to transfer and convey the unapplied residue equally amongst them. There also the devise was to a class, and not to individuals: there was also, in case of any of the children dying under age, a distribution over among the survivors, which disposes of another distinction now set up for the plaintiff, and the only three cases cited for him were cited there also. The question was there, as here, whether the interests limited to the children did not fail for remoteness; and it was held that they did not, because they were vested. *Murray* v. *Addenbrook* (*a*) and *Phipps* v. *Williams* (*b*) are also authorities for the defendants. In the latter case there were two devises, the one to *A.*, when and so soon as he should attain his age of twenty-one, and the other to *B.* when he should attain the age of twenty-four, on his giving the trustees security for certain annuities given by the testator, and executing certain deeds. It was held by the Vice Chancellor that *A.* took a vested interest, but that *B.*'s interest was altogether contingent on his attaining twenty-four, and doing the act required. The House of Lords (*c*) took a different view as to the latter devise, and held that the words respecting his executing assurances did not constitute a condition precedent.

Sir *W. W. Follett*, in reply. The children had no power of disposing of or transmitting the property independently of their attaining the particular ages, and therefore had no vested interest, so as to be entitled to the enjoyment of the estate on the death of the tenant for life. Before the par-

(*a*) 4 Russ. 407.
(*b*) 5 Sim. 44.
(*c*) *Ackers* v. *Phipps*, 3 Cl. & Fin. 665.

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ticular ages they could have no right to possession, all control is withdrawn from them, for the trustees are directed to apply the rents; maintenance is not equivalent to interest for the purpose of vesting a legacy; *Pulsford* v. *Hunter*(*a*); the children therefore could not maintain ejectment, as in *Edwards* v. *Hammond*(*b*). In *Boraston*'s case (*c*) there was no devise over. The distinction between devises to classes and individuals is not now taken for the first time; it was relied upon in *Farmer* v. *Francis*(*d*), but in that case there was no devise over, so that in case of the devisee's dying under age, his interest was transmissible. In *Murray* v. *Addenbrook* (*e*) and *Bland* v. *Williams*(*f*), the judgment proceeded on this—that there was a devise over in the event of the devisee's dying under age *without issue*; which circumstance of course shewed the testator's view to be that he had given them a vested interest. [*Patteson* J. In *Bland* v. *Williams*(*f*), the Master of the Rolls says that is the key to all the cases except *Bull* v. *Pritchard*(*g*); but it will not apply to *Doe* d. *Roake* v. *Nowell*(*h*).] But in that case, on the death of any of the children, there was no gift over among the survivors.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court:—The question arose on a devise, (his lordship then stated the terms of the devise,) and was, whether the vesting of these estates was not postponed till the devisees should attain twenty-three, in which case the devise was too remote, and the plaintiff would be entitled to recover as heir at law. Defendant relied on the doctrine of *Boraston*'s case (*c*), which has been recognized in so many others, among which it is not improper to specify *Edwards* v. *Hammond*(*b*), *Doe* v. *Moore*(*i*), *Bromfield* v. *Crowder* (*k*),

(*a*) 3 Bro. C. C. 416.
(*b*) 3 Lev. 132.
(*c*) 3 Rep. 19 a.
(*d*) 2 Bing. 155.
(*e*) 4 Russ. 407.
(*f*) 3 Myl. & K. 411.
(*g*) 1 Russ. 213.
(*h*) 1 Mau. & S. 327.
(*i*) 14 East, 601.
(*k*) 1 New Rep. 313.

affirmed in the House of Lords, and *Farmer* v. *Francis* (*a*): the plaintiff mainly relied on *Leake* v. *Robinson* (*b*), *Bull* v. *Pritchard* (*c*), *Vawdry* v. *Geddes* (*d*). But *Leake* v. *Robinson* was decided by Sir *W. Grant*, and *Vawdry* v. *Geddes*, by Sir *J. Leach*, on the peculiarity that those devises contained no direct gift to the class intended to be benefited, but only a direction to trustees to pay after the happening of the event. *Leake* v. *Robinson* (*b*), indeed, admits of another distinction, for the class is there described under the appellation of such of the children as shall attain twenty-five; and similar language, in both respects, is employed in *Bull* v. *Pritchard* (*c*), which was decided in the early time of Lord *Gifford*, as Master of the Rolls, and is said to have failed to give satisfaction. If that is so, no more striking proof can be given, how strong is the disposition to control the sense of words by which conditions precedent to the vesting of estates would seem to be indisputably created. For, if a devise to such as may attain twenty-four, or to the children of *A.* who shall attain twenty-four, will vest an interest in those who never attain the age described, the description given by the testator of the objects of his bounty is actually varied by the Court. Perhaps even this went no farther than the application of the same principle to the case of a devise, "*if* he shall attain twenty-four," which undoubtedly was a large step beyond a devise *when* he shall attain twenty-four. If the cases ran upon any construction of the will, we might be required to state our reasons for thinking that "at the age" no more created a condition precedent, than the phrases employed in former cases. But we are relieved from the necessity of doing so by an express decision on this very point, in *Doe* d. *Roake* v. *Nowell* (*e*), and *Randoll* v. *Doe*, in the House of Lords (*f*), which arose on the same will. An attempt was made to distinguish those cases from the present, because in them,

(*a*) 2 Bing. 151.
(*b*) 2 Mer. 363
(*c*) 1 Russ. 213.
(*d*) 1 Russ. & M. 203.
(*e*) 1 Mau. & S. 327.
(*f*) 5 Dow, 202.

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the devise being to the children at their age of twenty-one, no question of invalidity on the ground of remoteness arose —but the time, when under such a devise the estate is vested, is wholly beside the question of remoteness. Neither does the express devise over to the other children in the event of one dying under *twenty-three*, which was wanting in *Doe* v. *Nowell* (*a*), make such a distinction as to escape from the authority of that case. A further distinction was attempted to be made between a devise to an individual and to a class, but we do not think that distinction tenable, in the absence of authority; and even if it were, the case of *Doe* v. *Nowell* is an answer, for that was a case of a class. Upon the whole, we are of opinion that the children took vested estates in remainder immediately on the death of the testator, and that the plaintiff was not entitled to recover.

Judgment for the defendants.

(*a*) 1 Mau. & S. 327.

Friday, January 18th.

DOE *d.* RICHARDSON *v.* THOMAS and another.

A perpetual curate, whose curacy has been augmented by a grant of lands, under the Queen *Anne*'s Bounty Acts, cannot make a lease for three lives without the consent of the ordinary.

EJECTMENT for lands in Pembrokeshire. At the assizes for that county a verdict had been found for the plaintiff, subject to the opinion of this Court on the following case.

The parish of Little Newcastle, in the county of Pembroke, is a perpetual curacy, situate in the diocese of St. David's, and subject to the visitation and jurisdiction of the bishop of that see.

An indenture of bargain and sale, dated September 24, 1791, was then set out between *William Summers* of the first, the governors of Queen *Anne*'s Bounty of the second, and the Rev. *J. Rees*, curate of the curacy of Little Newcastle, of the third part; by which, after reciting that the governors had agreed to augment the said curacy a third

time with the sum of 200*l.*, and had ordered the same to be laid out in the purchase of lands, and that the premises after described had been found and approved of by them to be purchased for the further perpetual augmentation of the curacy of Little Newcastle, it was witnessed, that in consideration of 200*l.* paid to him by the said governors, *William Summers*, with their approbation and direction, did grant, bargain, sell, and confirm unto the said *J. Rees* and his successors, curates of the curacy of Little Newcastle, all those premises (which were set out), *habendum* to the said *J. Rees* and his successors, curates of the said curacy; and the said governors did allot and apply to the church or chapel of Little Newcastle all the said premises, and did thereby declare that the same should for ever thereafter be annexed to the said church or chapel of Little Newcastle, and should be from thenceforth held and enjoyed, and go in succession with such church or chapel for ever.

The ejectment was brought for the premises conveyed by *Summers* to *Rees*. In 1800, *James Rees* being still the curate, and his brother *J. R. Stokes* being the patron and impropriator of the same curacy, a lease was granted by *Rees*, which was confirmed and ratified by *Stokes*, to one *David Evan*, of the above lands, to hold for three lives, yielding and paying the yearly rent of 9*l.* 9*s.* to the said *James Rees* during his incumbency, and after, unto the said *J. R. Stokes*, his heirs or assigns, or unto the person or persons who for the time being should be entitled thereto. The lands included in the lease were lands which had been most commonly let to farm, and occupied by the farmers thereof, by the space of twenty years next before such lease was made thereof, and the yearly rent so reserved upon the lease was as much yearly rent or sum as had been most accustomably yielded or paid for the same, within twenty years next before the lease was made thereof. *James Rees* died September 28, 1835, and from the date and execution of the lease up to his death continued the curate of the

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perpetual curacy of Little Newcastle, and as such curate was, up to and at his death, in the receipt of the rent reserved. After his death, on September 29, 1835, the lessor of the plaintiff was presented to the said curacy, and on the 13th October, 1835, was duly instituted and inducted into the same, and has since continued to be the perpetual curate. One of the persons for whose life the lease was granted is still living. *David Evan* died in 1829, having made his will, and given the lease to his wife *Martha*, who hath since married one of the defendants.

The question for the opinion of the Court was, whether *James Rees* and *John R. Stokes*, or either of them, had any power to grant the said lease for the term of lives therein stated, without the confirmation of the ordinary of the diocese.

E. V. Williams, for the lessor of the plaintiff. The question is, whether a perpetual curate, whose benefice has been augmented by certain lands under Queen *Anne*'s Bounty Acts, can let those lands for three lives, without the consent of the ordinary. For the lessor of the plaintiff it is contended, that the present lease was void for want of such consent. The origin and character of perpetual curates is described in *Burn*'s Ecc. Law, 55, (Curate), citing *Gibs.* 819. Formerly a perpetual curate could not have any endowment, but only a stipend. But by 1 *Geo.* 1, st. 2, c. 4, all churches &c., which should be at any time thereafter augmented by the governors of Queen *Anne*'s Bounty, are declared to be perpetual cures, and the ministers nominated thereto, and their successors, are made bodies corporate, and enabled to take in perpetuity any lands granted to them by the governors; and section 21 contains a further provision for the same purpose. The defendants will contend that this statute gives a perpetual curate a fee-simple, in right of his church, in the lands granted, so as to bring him within the enabling clause of 32 *Hen.* 8, c. 28, s. 1, which empowers persons having a

fee-simple in right of their churches to make good and effectual leases, as if they had a perfect and pure estate of fee-simple to their own only uses; and that a perpetual curate is not within the proviso of the 4th section, which restrains a "parson or vicar" from making any lease in any other manner than he might have done before the passing of that act, because such curate is not either "parson or vicar." But a perpetual curate, after the augmentation of his curacy, is in the same situation with a parson or vicar at common law, who have no fee-simple in right of their churches; *Litt.* ss. 644, 645, 646, and 648, where the fee is said to be in abeyance. Whether it be so, or remain, as put by *Coleridge*, 2 Bl. Com. c. 7, in the grantors, the perpetual curate certainly has it not. The enabling part of the stat. *Hen.* 8, seems to have been intended to apply to bishops, deans, and others who have the fee-simple, and may maintain a writ of right; *Co. Litt.* 300 b; and sect. 4 is added ex abundanti cautelâ, and by way of proviso rather than exception. It was held, indeed, in *Acton* v. *Pitcher* (*a*), *Bisco* v. *Holte* (*b*), and *Watkinson* v. *Man* (*c*), that prebendaries were within the equity of the enabling statute; but in those cases it was assumed that prebendaries were seised in fee in right of their church, so that the authority of the passages in *Littleton* was not discussed. But perpetual curates cannot be within the equity of the statute, for at the time of its passing such curates had no lands to lease; and the words of a statute should be construed with reference to the subject or occasion on which they are used, and the object intended to be attained: per *Abbott* C. J., in *Rex* v. *Hall* (*d*). If perpetual curates had been in the contemplation of the statute, there is no reason why the enabling power should have extended to them. Assuming, however, that they are within it, they are also within the proviso, which restrains parsons and vicars from exercising

(*a*) 4 Leon. 51.
(*b*) 1 Lev. 112.
(*c*) Cro. Eliz. 350; 1 Lev. 112, n. to *Bisco* v. *Holte*.
(*d*) 1 B. & C. 136; *S. C.* 2 D. & R. 241.

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any new powers of leasing, for a parson is nothing more than persona ecclesiæ; *Co. Lit.* 300; *Fleta*, lib. 2, c. 19. In *Jenkinson* v. *Thomas* (*a*), a perpetual curate was held not to answer the description of a parson or vicar, so as to be liable for the penalties imposed on non-residence by 21 *Hen.* 8, c. 13; but the Court in that decision proceeded on the principles of the strict construction applicable to a penal statute.

Lastly, to make the present lease valid, under 32 *Hen.* 8, c. 28, s. 2, the rent reserved must be such as has been accustomably paid for the lands within twenty years next before such lease. Now these lands had not been in the possession of the incumbent more than nine years, so that the condition of the statute as to the letting of church lands could not have been complied with: 4 *Bac. Abr.* 712, Leases, (E), rule 6; *Doe* d. *Tennyson* v. *Lord Yarborough* (*b*).

Chilton, contrà. The special case itself was meant to exclude the point last raised, for it is stated that the lands were let at the rents accustomably taken for twenty years before the lease. The grantor had the fee-simple of the lands, and he has granted all his estate to the perpetual curate and his successors, who are, by 1 *Geo.* 1, made a body corporate. The curate therefore had the fee, and if he had it not in right of his church, in what other right did he hold? Having a fee in right of his church, he was within the enabling clause of the statute, and being neither parson nor vicar he is not within the proviso, and for the latter position *Jenkinson* v. *Thomas* (*a*) is a direct authority; the enabling part of the statute should be construed liberally, and the disabling part strictly.

E. V. Williams replied.

Lord Denman C. J.—The question is, whether lands, granted to a perpetual curate and his successors, by the

(*a*) 4 T. R. 665. (*b*) 1 Bing. 24.

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governors of Queen *Anne*'s Bounty, can be leased by him without the consent of the ordinary. On the part of the defendants, it is contended that he is within the enabling section of 32 *Hen.* 8, as being a person who is seised in fee in right of his church. I doubt whether he has a fee at all, but, if he has, he appears rather to hold by virtue of a donation under statute than in right of his church. But, assuming that he is within the enabling section, is he not also within the proviso of the 4th section, as a parson or vicar? It is admitted that a perpetual curate, having land, could not have been in the contemplation of the legislature in framing either the first section or the fourth. He certainly is not in terms within the latter clause, but I think that he may fairly be considered to fall within its provision, in furtherance of the objects intended by the legislature. He is a kind of vicar; he is not in possession of the great tithes, but is a subordinate person serving the church. *Jenkinson* v. *Thomas*(*a*) is against this opinion; but that was the case of a penal action, in which the statute was construed strictly. The present case, on the other hand, involves a matter of duty and policy relative to the disposition of property, and fairly admits the application of a more liberal principle of construction. If the statute does not apply to a perpetual curate at all, he remains with no greater powers than he had at common law, and the present lease is void for want of the consent of the ordinary.

LITTLEDALE J.—Little Newcastle is called a parish in the beginning of the case, but afterwards in the documents there referred to it is called a curacy. The lessor then appears to have been a mere curate. Was he therefore within the enabling clause of 32 *Hen.* 8, c. 28? Had he a fee-simple in right of his church? If not, there is an end of the case. Whether a parson has an inheritance in fee-simple, or something in the nature of such a fee, is immaterial. A bishop, who is said to have the fee, can no more

(*a*) 4 T. R. 665.

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sell the lands belonging to his see than a parson can the lands of his benefice. If a perpetual curate has a fee, I do not think he holds it in right of his church. But assuming that he does hold in that capacity, so as to be within the first section of the act, is he not also within the fourth section? He is certainly not a vicar by name, but what else is he in effect? He cannot be more than a vicar, and is substituted for a parson; I am therefore of opinion that he is either not within the equity of the first section, or that, if he is, he is within the equity of the fourth section also.

Williams J.—I think a perpetual curate is not within the enabling clause of 32 *Hen.* 8, for, until the subsequent statute of *Geo.* 1, which has been relied upon for the defendants, he was a mere stipendiary, and not a corporation sole. Supposing that by the latter statute he had an estate in fee in right of his church (which is a great concession in argument, as there must also be an impropriator), the question arises whether he is within the restraining proviso of the former statute. The duties of vicars and curates are not dissimilar, nor was their origin, for formerly a vicar was a mere stipendiary, and, whether with reference to these points or to the objects of the legislature, I think that we are justified in considering a perpetual curate to answer the description of vicar, for the present purpose, though in a penal case there prevailed a different construction.

Coleridge J.—The course of the present argument renders it not improbable that the same conclusion on the present question may be arrived at by different persons from different premises. I quite agree with the rest of the Court in their judgment, but my judgment turns principally upon this, that a perpetual curate is not within the enabling clause of 32 *Hen.* 8. At the time of the passing of that act he had no interest which could bring him within its operation; and so his condition remained until the passing of 1 *Geo.* 1, and so it remains now, where his curacy has

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not been augmented. In order to be brought within the enabling clause of the earlier statute, he must not only have an estate in fee, but in right of his church. Whether he has a fee depends upon a difficult question, namely, what is the nature of a parson's estate in his benefice—a question which it is not necessary for me to decide, for I am of opinion that, whatever estate the perpetual curate has, he has it not in right of his church. The statute of *Geo.* 1 has extended his interest, but has not altered its nature; so that, if he had no interest in right of his church before that act, he has none now. There is of course still a rector impropriate in Little Newcastle. The history of perpetual curates shews that they had no rights in the church, but merely performed ministerial duties for the monks. Having this opinion, I need not consider the effect of the fourth section of 32 *Hen.* 8, but I quite agree with the rest of the Court, that a perpetual curate can only be brought within the first section, as a kind of vicar, which would equally bring him within the latter section. The authority of *Jenkinson* v. *Thomas* (*a*) has been sufficiently distinguished.

Judgment for the plaintiff.

(*a*) 4 T. R. 665.

END OF HILARY TERM.

VACATION SITTINGS IN BANC,

AFTER HILARY TERM. (a)

Saturday, February 2d.

Where a parish was divided into eight tithings, each of which, before the new Highway Act (5 & 6 *Will.* 4, c. 50), maintained its own highways separately, and after the passing of that act each of the tithings elected one or more persons as surveyors, who formed a board for the parish, but rated the tithings separately as before the act:—Held, that the parish at large had no power to form a board under sect. 18, and that the rate made by them was bad.

The QUEEN *v.* BUSH.

ON an appeal against a rate for the repair of highways in the borough of Bradford, the Wiltshire quarter sessions confirmed the rate, subject to the opinion of this Court on a case in substance as follows:

Bradford is a parish consisting of eight several tithings. There are not overseers for each of the several tithings, nor do the tithings separately maintain their own poor, but there are four overseers annually appointed from some of the tithings for the whole parish, and there is one entire rate on all the tithings for the general maintenance of the poor of the whole parish. It has been the general custom in the parish to appoint surveyors of the highways for each tithing in the parish separately, and to raise a rate in each separate tithing for the repairs of the highways within the tithing, which has been applied to the repairs of the roads within the tithing in which the rate is raised, and there has been no general rate for the repairs of the highways in the whole parish conjointly.

The practice of appointing separate surveyors of each distinct tithing in the parish, and of separately rating the inhabitants of the tithings to the repair of the highways within each tithing, only continued until the vestry meeting for the nomination of overseers of the parish, held 31st of March, 1836, when the 5 & 6 *Will.* 4, c. 50 (the General Highway Act) had come into operation, at which meeting

(a) Under the 1 & 2 *Vict.* c. 32, the Court sat in banc from Friday, Feb. 1st, to Wednesday, Feb. 6th, inclusive.

it was unanimously resolved, "that it was expedient to form a board for the superintendence of the highways of the parish, and for the purpose of carrying into effect the provisions of the 5 & 6 *Will.* 4, c. 50;" and thirteen persons (some one or more being selected from each of the eight tithings) were then duly elected to serve the office of surveyors of the highways for the year ensuing, and to compose such board. The board so appointed managed the repairs of the highways until the next annual appointment of overseers, and appointed a clerk and a general surveyor at salaries, but made separate rates for each tithing in the parish, and applied the monies raised in each tithing for the repairs of the highways within such tithing, and not to the general repairs of all the highways in the parish. At the annual meeting for the nomination of overseers for the ensuing year, held on the 31st of March, 1837, a board was formed in pursuance of the 5 & 6 *Will.* 4, c. 50, for the superintendence of the highways of the parish, and for the purpose of carrying into effect the provisions of the said act, and four surveyors for the borough, and a surveyor for each tithing, constituted the board. The board of surveyors so formed continued the clerk and general surveyor as in the preceding year, and made a separate rate for the borough tithing of Bradford, which was the subject of the appeal; the appellant contending that since the act 5 & 6 *Will.* 4, c. 50, came into operation, and the resolutions of vestry of the 31st March, 1836, before stated, the rate ought to be a general rate for the whole parish, and not a separate rate for each tithing, and therefore that the separate rate for the borough tithing ought to be quashed.

The sessions found that the parish of Bradford consists of eight tithings; that from time immemorial such several tithings have been severally and separately assessed for the maintenance of the highways within such tithing respectively, and have had separate surveyors for such several tithings respectively, down to the 31st March, 1836; that such im-

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memorial custom was and is a legal custom; that for and notwithstanding the act of the 5 & 6 *Will.* 4, c. 50, or any thing done by the inhabitants of the said parish of Bradford, from the 31st March, 1836, the said custom of separately rating is a lawful and subsisting custom down to the time of the appeal. The questions for the opinion of the Court are, first, whether such custom be a valid custom in law, as found by the sessions; and secondly, whether the inhabitants of the borough tithing and the several tithings above mentioned, having united in forming a board, pursuant to the 5 & 6 *Will.* 4, c. 50, a separate rate for each of the other tithings, or one rate for the whole parish, is to be made conformably to the said act.

Bingham, in support of the order of sessions. By the new Highway Act (5 & 6 *Will.* 4, c. 50), three modes are pointed out of appointing surveyors of highways. By section 6 it is enacted, that the inhabitants of every parish, maintaining its own highways, are to elect one or more persons to the office of surveyors. Section 13 enacts, that parishes may be formed into districts for the purpose of having one sufficient person as district surveyor; and lastly, section 18 enacts, that in any populous parish, where the population exceeds 5000, a majority of the vestry may determine to form a board for the superintendence of the highways of such parish. Now first, as section 5 interprets "parish" to be any tithing or place maintaining its own highways, it is clear that the custom of separate rates for each tithing is not interfered with, and that such is a good custom. [*Littledale* J. There is no doubt about that. Sir *W. W. Follett*, contrà. It is not intended to contest that point.] That being so, it is equally clear that although the surveyors elected for these tithings call themselves a board, a separate rate for each tithing is still proper. But it is intended to be argued on the other side, that these tithings were not competent to form a board. [*Coleridge* J. How

does that point arise on the present case?] It does not arise, and was not made at sessions, but it may be forced into the argument. It is true that this board is not properly framed under section 18, and it will be said that, as the parish of Bradford is not, according to section 5, a place maintaining its own highways, but many places, each maintaining its own poor, it had no power to form a board for the parish at large; but as section 6 authorizes one or more persons to be elected for each tithing, and as these persons, when elected, may meet and act together, taking care only to make separate rates on each tithing, the fact of their calling themselves a board cannot make their acts illegal. The case indeed states that the board made the rate in question for the borough of Bradford, but those expressions have been introduced since the case was at sessions, for the fact is, that the four borough surveyors only made the rate for the borough (*a*). No express clause provides for the case where one parish contains several tithings, maintaining their own highways, but by the analogy of section 16, which provides for the case where several parishes have united to appoint a district surveyor, and enacts that the district surveyor shall apply the money raised by each parish separately, it is submitted that the course adopted by the parish of Bradford in the present instance is strictly correct.

Sir *W. W. Follett* (with whom was *Ball*), contrà. The parish of Bradford have adopted an erroneous construction of the new act. That parish being divided into tithings, maintaining their own highways separately, had no power to appoint a board, for it had nothing whatever to do with the highways of the parish. If any one of the tithings contained a population exceeding 5000, that tithing only might appoint a board. It is clear therefore that the tithings,

(*a*) Reference was made to the printed form of appeal, in which the rate was stated to have been signed by the four surveyors of the tithing of Bradford, i. e. the borough of Bradford.

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instead of following the custom, which it is conceded is unaltered by the act, of making a separate rate for each tithing, have fallen into the error of allowing the general board to make a rate for the tithing. [*Coleridge* J. That is not so, if the fact is, as stated by Mr. *Bingham*, that the borough surveyors only made the rate.] The case expressly states that the board made the rate. Suppose even the four surveyors only of the borough tithing had signed the rate, that would not make it valid, for still it would be the rate of the board, and the board is illegally constituted.

LITTLEDALE J. (*a*)—There is no doubt the rate is bad, but the questions put to the Court seem to imply that the constitution of the board was valid, which it clearly is not. The finding of the sessions, therefore, is like an imperfect verdict. The rate must be quashed.

WILLIAMS and COLERIDGE Js. concurred.

Order of Sessions quashed.

(*a*) Lord *Denman* C. J. was at the Privy Council.

Saturday, February 2d.

The QUEEN *v.* The Inhabitants of NARBERTH NORTH.

Saleable underwood under the 43 *Eliz.* c. 2, means such shoots from old stools as are capable of reproduction, and of being treated by the wood-owner so as to yield a succession of profits, and the circumstances to determine this question are matters of fact for the sessions.

Therefore, where a plantation of oaks was cut down last, in 1786, and shoots grew up from their stools, which were occasionally weeded, and at the end of fifty years the wood-owner cut some every year, which he sold for colliery purposes and fire-wood, and the sessions decided that they were not saleable underwood; the Court held that they would not disturb their decision, although *semble*, per *Coleridge* J., that the decision was wrong upon the facts.

ON an appeal against a rate made by the parish of Narberth North, the Pembrokeshire quarter sessions quashed

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the rate with costs, subject to the opinion of the Court of Queen's Bench, on the following case:

The rate was made on the 16th September, 1837; the appellant is thus assessed in the rate:

Names of Occupier.	Description of Property.	Rental or Annual Value.	Amount at which the Property is assessed.	Amount of Poor-rate to be collected at 8d. in the Pound.
		£. s. d.	£. s. d.	£. s. d.
Rütsen, Baron de.	Cannaster Wood.	105 0 0	105 0 0	3 10 0

The appellant is the owner and occupier of the wood called Cannaster Wood, which is in the parish of Narberth North, and is of the extent of 350 acres, or thereabouts. The wood consists chiefly of oak, but there are a few ash, alder and beech trees, growing therein. The oaks do not grow from acorns, or original or maiden trees, but from old oak stools belonging to trees that were last felled about the year 1786. About that year the wood was cut down by the then proprietor thereof, and at that time they were cut from old stools. Since that period they have again sprung or grown up from the old stools or stumps, but no regular cutting of them has taken place since that time until within the last four years. Several of the trees grow from the same stool or stump. They are called poles, and are used for colliery purposes, and for fire-wood. The appellant, during each of the last three years, has cut down portions of these poles and sold them; the mode of treating them while felling, is to cut off at the stump the worst shoots, and leave the best and most promising shoot to stand for further growth. These poles are sold by the dozen, and not by admeasurement, as large timber is sold. They have been occasionally waste-weeded by cutting down the crooked shoots to improve the trees that remained; waste weedings are permitted to lie on the ground to rot. The trees or poles cut down by the appellant had been growing

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for fifty years. The bark is stripped from the poles and sold by the ton, and the poles thus stripped are sold for the use of collieries by the dozen. The Sessions considered that these trees were not saleable underwood within the meaning of the 43 *Eliz.* c. 2, and ordered the rate to be quashed.

The question for the Court is, whether these trees are saleable underwoods within the meaning of the statute. If they are, then the rate is to be confirmed; but if not, then it is to be quashed.

J. Evans and *R. V. Richards*, now argued in support of the order of sessions. The facts of the case shew clearly that the poles in this case were not *saleable underwood*. All rateable property must be such that it can be rated communibus annis; and although it is true that *Rex* v. *Mirfield* (*a*) decides that, if there be a fall of underwood once in twenty years, it may be rated, that comes within the above principle, because the profits accruing at stated periods, may be distributed equally over every year. But here there has been no stated period for felling. [*Coleridge* J. The difficulty of that principle would be that, if the proprietor chose to cut at irregular periods, he might exempt himself from rate. The nature of the growth must be looked at.] The statute of *Elizabeth*, which speaks of saleable underwoods, has received an elaborate exposition in *Rex* v. *Ferrybridge* (*b*), which entirely governs this case. In that case firs and larches had been planted as a shelter to oak and ash, and also to make a profit by cutting the firs and larches from time to time, when the young timber required more space. Considerable thinnings of the firs were made from time to time, and the poles so cut were thirty years old, and from thirty to forty feet high. The Court held that these firs or larches were not saleable underwood. That case is nearly identical with the present, except that here the trees were fifty years old, which removes them still further from the popular meaning of underwood,

(*a*) 10 East, 219. (*b*) 1 B. & C. 375; *S. C.* 2 D. & R. 634.

which is the sense in which, according to *Holroyd* J. in the above case, it is used in the statute of *Elizabeth*, and that learned judge laid down that underwood signifies all wood which is not *haut bois*, which definition excludes oaks and ash. *Bayley* J. also decided that, as profit to be derived from periodical cutting was not the object of planting, the trees did not come within the statute. The sessions have in fact decided this case on the facts, as the jury did in *Aubrey* v. *Fisher* (*a*), and that finding is conclusive. The liability of trees like the present to tithe, may perhaps be insisted on, but that is immaterial, because every species of wood which is not timber is titheable, and the exception under 45 *Edw.* 3, c. 3, in favour of *gros bois*, does not include germins growing from old stools. *Chichester* v. *Sheldon* (*b*) decides that point, but it has nothing to do with the question whether they are saleable underwood or not, for the trees in that case were undoubtedly timber.

E. V. Williams, contrà. The onus is upon the wood-owner to shew that he is exempted from rate. Timber is in no case rateable, because it affords no succession of profits; but in the present case there is a valuable property in the parish periodically renewing, and affording a succession of profits, which the owner has it in his power to take at stated times. The poles in this case all grow from old stools, from which new shoots spring from time to time, whenever there is a fall. There is therefore strictly a succession of profits. According to the definition of underwood in *Com. Dig.* Chase, (N 1), *south boys*, which is the correlative of *hault boys* or great timber, comprehends all underwood; and therefore oaks or any other trees, springing from old stools, would be included under the term, and if such growth can be so treated as to yield a succession of profits, it is rateable. At the period of passing the 43 *Eliz.* c. 2, the principal fuel of the county was probably wood, and the growth of underwood much more general in

(*a*) 10 East, 446. (*b*) 1 Turn. & Russ. 245.

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consequence. The object of the legislature was to protect the growth of timber, and also to prevent the too rapid consumption of underwood; for by the 35 *Hen.* 8, c. 17, it is enacted, that no person, except in certain specified cases, should be permitted to convert coppice or underwoods into tillage, which in the forest laws was called an assart (*a*). The terms "haut bois" and "sous bois" were not used then to distinguish timber from underwood; timber being called *maresmium*, as appears from *Rol. Abr.* tit. Maeresme, 119.

It is therefore quite possible that underwood then might be considered to include young oaks which were not *arbores maresmiales*. This is confirmed by what Lord *Hardwicke* said in *Walton* v. *Tryon* (*b*), that great part of the coppices is grown from germins of old timber trees and such (oak) stools of timber wood.

To try then whether this wood would have been saleable underwood at the time of the statute of *Elizabeth*, suppose the owner had cut down the whole wood, then he would have been rateable for the whole, for the stools would have remained from which new shoots would spring, and he could not have alleged that he did not intend to grow any more underwood, because by the 35 *Hen.* 8, c. 17 (subsequently repealed), he was prevented from converting the land into tillage. It is admitted that, if the wood-owner intended to leave the young growth to grow into timber, he would not be rateable, but that fact in such case must be determined upon by the sessions. The mere fact of varying the periods for cutting underwood cannot withdraw it from the rate, at the will of the owner. *Rex* v. *Ferrybridge* (*c*) was properly decided, because firs and larches, which do not spring from stools, can in no case yield a succession of profits, and are therefore not rateable. The titheability of such trees certainly does not conclude the question, whether they are rateable or not, because as

(*a*) See Com. Dig. Chase Wast, (N 9).

(*b*) Ambl. 133.

(*c*) 1 B. & C. 375; *S. C.* 2 D. & R. 634.

in *Evans* v. *George* (*a*), which was the last case on the point, the trees, which were undoubtedly timber, were of eighty years' growth; but that case throws some light on this case, because in deciding that *timber* trees growing from old stools were not exempt from tithe, under the 45 *Edw.* 3, the different judges all recognized that germins of oaks &c., springing from old stools &c., might constitute underwood.

LITTLEDALE J. (*b*)—No case has been decided exactly like the present. The first question is, whether this is underwood at all, and I should consider all such small growths as were never likely to grow into timber to be underwood. If, for instance, ash or oak are treated in such a manner as shews that they were not planted with a view to become timber, but were cut down at stated periods for hop poles and other purposes, I should consider them to be underwood. The trees in the present instance, I should suppose, were never intended to grow up to timber, and, from the facts stated in the case, I should say they were underwood. The next question is, are they saleable underwood within the statute of *Elizabeth*? All wood that is or may be sold, is in one sense saleable, but I apprehend the meaning of the expression in the statute applies to that description of underwood only which yields a succession of profits, and that must depend on the mode in which a plantation is managed. All the particulars which determine whether the underwood is saleable or not, ought in fact to be determined by the sessions. In the case of *Aubrey* v. *Fisher* (*c*), the question was left to the jury. So in this case, the question turned on peculiar circumstances, and was left to the decision of the sessions, and I cannot say they have decided wrong.

WILLIAMS J.—The sessions intended, no doubt, to leave a question for our decision, and if they came to a wrong

(*a*) 12 Price, 76; *S. C.* nom. *Evans* v. *Roxe*, M'Clel. & Y. 557.

(*b*) See note (*a*), *ante*, 590.

(*c*) 10 East, 446.

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conclusion, we are at liberty to reverse it. It has been contended that these plantations yield a profit, and are therefore rateable, but that is not sufficient, for timber does so likewise, which is confessedly excluded. I agree, however, that the nature of the tree does not determine the question, for if oaks were cut down every twenty-five years, they would no doubt be rateable. The treatment of the plantation therefore by the owner, must be the point looked at. If so, the question may be asked, where the limits are to be placed as to the periodical cuttings, which distinguish underwood from timber? If ash may be cut down every fifteen years, and the slower-growing oak every thirty or forty, and both be applied to the same purposes, can one be said to be underwood and not the other? No case draws any such distinction. If then there is no rule of law to determine what shall be underwood or what not, there is nothing to prevent the sessions from determining the question of fact according to the treatment of the wood by the owner. They have done so in this case, as the jury did in *Aubrey* v. *Fisher* (*a*), and I concur in thinking their decision ought not to be disturbed.

COLERIDGE J.—I am of the same opinion, although I have come to it with some difficulty, owing to the previous decisions. On inquiring into what is saleable underwood, we have to determine whether it is underwood, and whether it is saleable. Without pretending to be a naturalist, I should say that any shoots growing from old stools, in plantations, among other trees, constitute underwood, and therefore I do not quarrel with the decision in *Rex* v. *Ferrybridge* (*b*), which determined that firs and larches are not underwood, because they do not grow from stools, but when cut down their boles rot in the ground. The Court however went out of their way in that case, to lay down definitions of underwood, which I think are not applicable.

(*a*) 12 East, 446. (*b*) 1 B. & C. 375; *S. C.* 2 D. & R. 634.

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I think that these poles were underwood. Then are they saleable underwood? No doubt they are, for they are actually sold; but, according to *Rex* v. *Ferrybridge* (*a*), we are told to look at the purpose for which they are planted and cut down, and that, if profit is not the principal object of the cutting, they are not rateable. But look at the different copses throughout the county, which are growing from old stools, or at firs and larches in plantations, which every one knows are ordinarily planted as nurses for other trees. In the lapse of a few years they are capable of yielding great profit; on principle, therefore, one would conceive that such growths should be rateable. But the original purpose of planting in either of these cases does not include the profits actually received. Mr. *Williams* went near to give the proper definition of saleable underwood, in stating it to include all such growths as are capable of reproduction, and of being treated by their owner so as to yield a succession of profits. And I agree that with such plantations the owner shall not be allowed to avoid the rate, by any irregular mode of directing the cuttings. But let us look at the facts of the case. The wood, it appears, was cut down fifty years ago, and lately there have been regular cuttings for the last three or four years, but these cuttings do not appear to have been for the mere purpose of getting a profit, but from the additional motive of improving the plantation. These are the facts, and upon these the sessions do not find that anything has been done out of the ordinary course adopted in that county by woodcutters, to avoid the poor's rate, which they ought to have done in order to bring the case within the argument of Mr. *Williams*. They have therefore concluded that this is not a case in which there is such a calculable succession of profits as to justify a rate.

Now I do not say the sessions have come to a right conclusion, and if I had had to decide, I might probably have adopted a different view; but as it is a pure question of

(*a*) 1 B. & C. 375; *S. C.* 2 D. & R. 634.

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fact, unless we can see that the sessions were wrong in point of law, we ought not to disturb their decision. To that extent only my judgment goes.

Order of Sessions confirmed.

Saturday, February 2nd.

The QUEEN *v.* The Inhabitants of BISHOPTON.

In 1813 the pauper's children were engaged to work at a mill for three years. *T.*, the owner of the mill, rented three cottages in the parish of B., distant one-eighth of a mile from the mill, for the convenience of the families employed there. The pauper occupied one of the cottages, and agreed to pay 2*s.* a week for the cottage, which was to be deducted out of the children's wages. The children worked for the three years, and some of them for a longer period. The pauper occupied the cottage till 1829, when he quitted, on being required to do so, without any regular notice to quit. The pauper was never in the service of the mill-owner. On these facts the sessions decided that the pauper had gained a settlement in B. by occupying a tenement under the 13 & 14 *Car.* 2, c. 12, subject to a case.—Held, that it was a question of fact for the sessions, whether the occupation of the cottage was ancillary to the services of the children, and that on the facts stated the pauper had gained a settlement.

ON an appeal against an order of two justices for the removal of *George Winterburn* and *Ann* his wife from the township of Ripton, in the liberty of Ripton, in the West Riding of the county of York, to the township of Bishopton, in the said liberty, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

Prior to the year 1815 the pauper, *George Winterburn*, his wife and nine children, resided at Bishop Thornton, in the county of York, and some of his children worked in a mill there. In that year he removed with his family into a cottage at Bishopton, situated within one eighth of a mile from a flax mill belonging to one Mrs. *Coates*. This cottage and two others adjoining it were rented by Mrs. *Coates* from a Mr. *Swinder*, for the convenience of the families employed at her mill, some of the children of each family living in these cottages being so employed. The pauper had six children who worked at the mill, and who were engaged for three years. The pauper made the bargain with Mrs. *Coates*'s manager, who is dead, which was, that two shillings per week was to be paid for the use of the cottage; which sum was to be deducted from the children's wages. The children continued to work for the three years originally contracted for, and some of them for a longer period. The pauper continued to occupy the cot-

tage until the year 1829, at which time one of his sons, being then 24 years of age, still worked there, and continued to do so after the pauper left the cottage and removed to Ripton. During the time he occupied the cottage the pauper worked as a husbandman for various persons, and occasionally for Mrs. *Coates*, but never was her servant. In 1829 the three cottages were sold by Mr. *Swinder* to a third party, and the usual notice was given to Mrs. *Coates* to deliver up possession thereof to the purchaser. The pauper in consequence was required to move, which he accordingly did after a few weeks, without having received any regular notice to quit. During his occupation of this cottage the pauper rented other tenements within the township of Bishopton of a sufficient value, if added to the cottage, to confer a settlement in that township. The question for the opinion of the Court is, whether, under the foregoing circumstances, the occupation of the cottage by *George Winterburn* was such a renting of a tenement as to aid in conferring a settlement within the meaning of 13 & 14 *Car.* 2, c. 12.

J. Talbot, and *J. Ingham*, in support of the order of sessions. To gain a settlement by renting a tenement, under the 13 & 14 *Car.* 2, c. 12, it is quite clear that there need not be a specific tenancy, and that it is sufficient if the party come to occupy on his own interest, and not as the servant of another; *Rex* v. *St. Mary, Newington* (*a*), *Rex* v. *Fillongley* (*b*). The only question, therefore, is, whether the pauper in this case did occupy as a servant, and that seems disposed of by the finding of the sessions, that he was not Mrs. *Coates*'s servant. For it is not sufficient that a tenement be taken for the purpose of some service or other; to deprive a party of a settlement, the tenement must be occupied as the servant of the landlord. On examining the cases where it has been held that the occupation of a tenement being merely ancillary to a ser-

(*a*) 5 B. & Ad. 540. (*b*) 1 T. R. 458.

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vice was insufficient to confer a settlement, it will be found that the strict relation of master and servant actually existed in all of them; *Rex* v. *Field* (*a*), *Rex* v. *Cheshunt* (*b*), *Rex* v. *Seacroft* (*c*). But where the residence is independent of the service, then a settlement is gained; *Rex* v. *Iken* (*d*), *Rex* v. *Cherry Willingham* (*e*), *Rex* v. *Minster* (*f*), *Rex* v. *Lower Heyford* (*g*). Even, therefore, if the pauper had been a servant, as residence in the cottage was not ancillary to his occupation, it would not deprive him of his settlement. In no case has it been intimated that the being servant to any one else destroys the effect of renting a tenement, under the statute of *Charles*. *Rex* v. *Wall Lynn* (*h*) is the last case upon this point, and it proves completely that the residence must be strictly connected with the particular service in order to deprive the pauper of his settlement.

Dundas, contrà. It is not contended that the pauper was a servant to Mrs. *Coates*, but it is submitted that, as the occupation of the pauper was merely ancillary to the service of his children, it was not an independent occupation, and therefore not a "coming to settle" within the statute of *Charles*. If the children had died the pauper might have been turned out at once; the rent payable was strictly connected with the service of the children, and on that service being put an end to, would cease *pari passu*. The real question in these cases is, what was the intention of the parties at the time of making the contract? If the hiring of a tenement was the subject-matter contemplated, then a settlement would be gained; but if the service of the children was the real object of the agreement, and the occupation of the cottage was granted for the purpose of securing their services, then no settlement was gained.

(*a*) 5 T. R. 587.
(*b*) 1 B. & Ald. 473.
(*c*) 2 Mau. & S. 472.
(*d*) 2 A. & E 147; *S. C.* 4 N. & M. 117.
(*e*) 1 B. & C. 626; *S. C.* 3 D. & R. 13.
(*f*) 3 Mau. & S. 276.
(*g*) 1 B. & Ad. 75.
(*h*) 3 N. & P. 411.

Rex v. *Wall Lynn* (*a*) and *Rex* v. *Lower Heyford* (*b*) were no doubt rightly decided; but in those cases the paupers occupied as independent occupiers, and were rated to and paid all the parochial rates. In many cases the Court has inquired what the principal object was at the time of the contract. Thus in *Rex* v. *Seacroft* (*c*), where the waiter paid for the privilege of the tap at an hotel 60*l.* a year, the Court held that there did not appear to be any *taking* as a tenant. So in *Rex* v. *Kelstern* (*d*), where the pauper was to have 20*l.* a year and a house and garden, Lord *Ellenborough* C. J. held that, as the house was given the pauper for the mutual convenience of himself and his master, it was like the occupation of rooms by a coachman, and was not an independent occupation. So also in *Rex* v. *Ightham* (*e*), the whole inquiry of the Court was directed to the point whether the contract of the pauper was intended to be one of service or apprenticeship.

LITTLEDALE J. (*f*)—I think, on the facts stated in the case, that the pauper has gained a settlement. In the cases cited, to shew that a settlement was not gained, the relation of master and servant existed and the occupation was ancillary to the service, but here the pauper was not a servant at all. He appears to have been employed by several persons as a labourer in husbandry, and then to have made this agreement with Mrs. *Coates*, by which his children were to work for her in the mills, and he was to pay 2*s.* a week for the cottage. This was clearly a taking of the cottage to rent; but it is urged that, as the cottage was merely let to him as ancillary to the service of his children, it was not an independent occupation. No doubt the pauper would not have been allowed to have the cottage but for that, but still he agrees to pay rent, and that primâ facie constitutes the

(*a*) 3 N. & P. 411.
(*b*) 1 B. & Ad. 75.
(*c*) 2 Mau. & S. 472.
(*d*) 5 Mau. & S. 136.
(*e*) 4 A. & E. 937; *S. C.* 6 N. & M. 320.
(*f*) See note (*a*), *ante*, 590.

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relation of landlord and tenant; therefore, taking it altogether, I think he gained a settlement.

WILLIAMS J.—It is to be regretted that the sessions did not decide this question on the mere matter of fact. In the cases cited by Mr. *Dundas* the service and the residence were identified, but that is not so here; and the stipulation as to the 2*s*. to be deducted out of the wages of the children was a mere mode as to the payment of rent.

COLERIDGE J.—I think the sessions ought to have decided the fact whether this cottage was taken for the purposes of the service or not; and whichever way they had decided I should not have quarrelled with their decision. I agree with the principle laid down by Mr. *Dundas*, that the object of the contract is the point to be looked at; and I do not think that the occupation of a tenement need be identified with service under the landlord. If the tenement be taken as merely ancillary to some service or other, I am inclined to think it would not be sufficient. The facts here do not very distinctly shew what was the object of taking the cottage, or whether, if the children had ceased to work at the mill, the tenancy would have been put an end to; but on the whole I agree with the rest of the Court, that a settlement was gained.

Order of Sessions confirmed.

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The QUEEN v. The Company of Proprietors of the BLACKFRIARS' BRIDGE.

A local act of parliament recited that it would be of great utility to the public to build a bridge, and empowered a Company to raise a capital sum amongst themselves by shares, and to borrow a further sum, by mortgage or annuity, for the building thereof, and authorized tolls to be taken, and enacted that the tolls should be applied first in discharging the expenses of the act and paying the mortgagees their interest, and that the surplus should be divided among the proprietors, not exceeding 7½ per cent. on their shares. The excess arising from the tolls beyond the dividend was to be applied in paying off the capital advanced by the proprietors; afterwards to pay off the mortgage debt, afterwards to form a fund for the repairs of the bridge, and then the tolls to cease altogether.

The Company raised the sums authorized under the act, and also incurred a further debt in completing the bridge. The tolls, which amounted to 1500*l.* a year, were applied in discharging this further debt and the interest of the money raised. This debt had not been wholly discharged, and no dividend to the proprietors had ever been made.—Held that the Company had a beneficial interest in the tolls till their capital was paid off, and that they were therefore rateable to the poor's rate as occupiers of the bridge.

ON an appeal against a rate for the relief of the poor of the township of Salford, the Lancashire Quarter Sessions confirmed the rate, subject to the opinion of this Court on a case in substance as follows:—

The Company of Proprietors of Blackfriars Bridge appealed against a poor's rate for the township of Salford, upon the ground, amongst others, that they were not beneficial occupiers of the same. By an act passed in the year 1817, intituled, "An Act for building a Bridge across the river Irwell, from Water Street, in the Township of Salford, to St. Mary's Gate, in the Township of Manchester, all in the County of Lancaster, and for making proper Avenues thereto,"—(which act was to form part of the case,) and reciting, inter alia, that it would be of great utility, not only to the numerous inhabitants of Manchester but to the public, if the old bridge were taken down and another bridge erected in lieu thereof,—certain persons were incorporated by the name of "The Company of Proprietors of the Blackfriars' Bridge;" and by the same act the said Company were empowered to raise any sum of money not exceeding 17,700*l.*, to be divided into shares of 50*l.* each. It was further enacted that, if the said sum of 17,700*l.* should be found insufficient for building the bridge, the Company might raise the further sum of 12,000*l.*, either by fresh contributions amongst themselves or by mortgage of the said bridge, or by granting annuities out of the tolls. It was further enacted by the said act, that the tolls that should be collected under and by virtue of this act should

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be applied, in the first place, in discharging the expenses of obtaining the act, and from time to time of carrying the same into execution, and of keeping the bridge in repair; and, in the next place, in paying to the mortgagees and annuitants the interest and annuities &c.; *and the surplus thereof should be divided amongst the proprietors in proportion to their shares*, in the manner following; that is to say, that the said proprietors should be entitled to receive out of the tolls thereinbefore allowed to be taken and received, interest, after the rate of 5*l.* per cent. per annum, upon the respective sum or sums of money which should have been paid upon their respective shares, for and towards the execution of the said undertaking; which interest should commence and be computed from the time or respective times of payment of such sum or sums of money, or of the instalments thereof respectively; and from and after the time when the said bridge should be opened for the passage of horses &c., the said proprietors should, instead of such interest as aforesaid, be entitled to and receive an interest and dividend upon their respective shares out of the said tolls, so as that such proprietors did not receive more than 7*l.* 10*s.* per annum; and when and as soon as such surplus should be more than sufficient to pay such interest and dividend of 7*l.* 10*s.* per annum, the excess was to be applied in discharge of the principal sum paid by the proprietors rateably, until the whole sum of 17,700*l.* should have been paid off and discharged, and from thenceforth the several proprietors should cease to receive any further share of the tolls, and the tolls should be accumulated to pay off the mortgages, and to form a fund of £—— for the repairs of the bridge, and then that the tolls and duties should wholly cease and determine.

In pursuance of the powers of the act the Company purchased land for making the bridge, raised among themselves 17,700*l.*, and borrowed on mortgage 12,000*l.* They did not grant any annuities. These sums were not sufficient for the building and completing the bridge &c., and

they incurred a further debt, a balance of which debt, viz. 3225*l.*, still remains unpaid. The bridge was opened to the public about 1822.

The tolls hitherto received by the Company have been by them applied, after defraying the necessary expenses incidental to the undertaking, in paying and keeping down the interest of the mortgages, and in the liquidation of the debt, as aforesaid. No surplus has hitherto existed, after making such payment, for a dividend, and none has been declared; and the Company have not yet received any dividend or interest upon the subscribed sum of 17,700*l.*, or any part thereof. The tolls are let in the current year for 1500*l.*, and in the preceding year were let for 1130*l.*

The question for the opinion of the Court is, whether the Company of Proprietors are liable to be rated, under the circumstances and with reference to the enactment hereinbefore set forth.

S. Martin and *Bere*, in support of the order of sessions. The principle is clearly established that, where the rents and profits accruing from any property are devoted exclusively to public purposes, such property is not rateable; *Rex* v. *The Trustees of the River Weaver* (*a*), *Rex* v. *Inhabitants of Liverpool* (*b*), *Rex* v. *Beverley Gas Light Commissioners* (*c*). But when any profit is receivable by private persons, although there may be an ultimate destination for the public, then a rate may be imposed. And it is quite immaterial whether the parties have received any profit or not; all that is required to make them liable to a rate is, that there should be a possibility of receiving profits, for they are rateable, although the property is a losing concern; *Rex* v. *Parrot* (*d*). In the present instance the proprietors are enabled by the rate to receive a dividend of 7*l.* 10*s.* per cent. per annum, and have a further beneficial interest in the possibility of having all their capital paid

(*a*) 7 B. & C. 70 n.; *S. C.* 9 D. & R. 788.
(*b*) 7 B. & C. 61; *S. C.* 9 D. & R. 780.
(*c*) 6 A. & E. 645; 1 N. & P. 646.
(*d*) 5 T. R. 593.

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off: they are, therefore, clearly liable to be rated, and they resemble a railway company, whose profits are always limited to a certain sum by their act of parliament. As soon as the Court finds that profits are or may be made from a property, they hold it a fit subject for a rate; *Rex* v. *St. Giles, York* (*a*), *Governors of Bristol Poor* v. *Wait* (*b*).

L. Peel and *Walker*, contrà. The principle in this case is not in dispute, for it is admitted that public property is not rateable; and it clearly appears from the preamble to the act that this bridge has been erected for the utility of the public. The dividend which the proprietors are entitled to receive is no more than interest for the money advanced; and although the dividend may be as high as 7*l.* 10*s.* per cent., this is only a suspension of the usury laws in their behalf. In no case has it been held, that interest paid on money raised for a public undertaking constitutes rateable profits. Suppose that in *Rex* v. *Liverpool* (*c*) the lenders of money to the dock trustees had been entitled to receive 6*l.* per cent. instead of 5*l.*, would that fact have made any difference in the decision of the case? Could the excess of interest over the legal rate of 5*l.* per cent. on ordinary loans, which in that case would have been payable to the creditors of the estate, have been held to constitute a profit out of the lands, so as to make them rateable; then what difference can it make that in the present case the Company have raised the money amongst themselves instead of borrowing it from strangers? The shares are, by the 2d section of the act, the separate personal estate of the individual subscribers; each subscriber is therefore a creditor of the Company to the extent of his shares. It is in either case mere interest of money advanced. But conceding that the Company might be rated if they received a dividend of 7*l.* 10*s.* per cent., that is no ground for making them rateable now, in the present state

(*a*) 3 B. & Ad. 573.
(*b*) 5 A. & E. 1; *S. C.* 6 N. & M. 383.
(*c*) 7 B. & C. 61; *S. C.* 9 D. & R. 780.

of the undertaking, when, as it appears from the case, they have as yet received nothing. The only source of profit is from the tolls. Those tolls have hitherto been wholly applied in paying the interest of the mortgage debt, and in the completion of the undertaking; that is, in defraying the principal and interest of the money wanted and raised for the purpose of completing the undertaking, over and above the monies authorized to be raised by the act, and which proved deficient. In *Thicknesse* v. *Lancaster Canal Company* (*a*) it was considered by the Court that tolls were applicable for this purpose. If so, money might be raised for the purpose, and the tolls applied to discharge it. This has been done, and no profit has yet arisen. It has never been decided that property, which at a future time may produce rateable profit, is rateable before the profit arises. It is true that, if an individual buys an estate for more than it is worth, and so loses money by it, that it is still rateable; but this is not a parallel case, for the return is only net profit to him. So also where no profits are made by a company or trustees in any particular years, although large profits accrued *communibus annis*, they are rateable; *Rex* v. *Hull Dock Company* (*b*); but even in that case *Holroyd* J. said, "The only doubt which I have entertained has been on section 22, which obliges the Company to repair the dock and other works; and if under that section the specific rates had been, so far as they were required, appropriated to that purpose only, I should have entertained considerable doubt whether any property vested in the trustees could properly be made the subject of rate, beyond the surplus which might happen to remain in their hands, after satisfying the expenses attending the maintenance and repair of the works. But the case is not so." The present case, however, falls completely within that put by the learned judge, for it appears that the tolls have all been applied in paying and keeping down the interest of the

(*a*) 8 Law Journ. (N.S.) Exch. 49; *S. C.* 4 M. & W. 472.

(*b*) 5 Man. & S. 394.

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debts necessarily raised and incurred for the undertaking. *Rex* v. *Mirfield* (*a*), and the case just decided by the Court, *Rex* v. *Narberth North* (*b*), shew that there must be a calculable succession of profits before a rate can be imposed; but that implies that profits must actually accrue. [*Coleridge* J. Do not the Company stand in the position of a mortgagor in possession, who still has a beneficial interest in the estate, although a great part of the proceeds goes towards paying off the interest?] It is submitted that they are mere recipients of the tolls, on a property devoted to public purposes, and that the application of those tolls to defray the interest and to the payment of money raised for the undertaking, is strictly one of those purposes. [*Littledale* J. Suppose a public-spirited individual with a large capital should determine to build a bridge for the benefit of the public, and should obtain an act like the present to enable him to take tolls until his capital were repaid, would not he have a beneficial interest in the property?] In *Rex* v. *The Mayor of Liverpool* (*c*), decided last term, the parties employed under the trust received salaries out of the dues, which is equivalent to the interest to be received in the present case; but it was held that the property was not rateable, because the ultimate destination was to public purposes. So here the ultimate destination is to public purposes, and the imposition of a rate would only tend to postpone the free use of the bridge by the public.

LITTLEDALE J. (*d*).—I cannot distinguish this case from the one which I have just put, where an individual should build a bridge at his own expense, and get an act drawn like the present, enabling him to take tolls to reimburse himself. Here is land, on which by an act of parliament tolls are allowed to be taken, and therefore primâ facie

(*a*) 10 East, 219.
(*b*) *Ante*, 590.
(*c*) *Ante*, 334.
(*d*) Lord *Denman* C. J. was at the Privy Council.

there is a beneficial occupation. But it is said that no profit is made, as the tolls pay only a fair interest on the money laid out. That, however, is exactly what might be contemplated by an individual in the case supposed; he might be perfectly satisfied with a fair interest arising out of the tolls. It is immaterial whether profit is realized. Here it is enacted that, after the opening of the bridge, the proprietors shall receive a dividend not exceeding 7½ per cent. on their shares. But it is contended that there will be a time when that will cease, as on the paying off the capital of the Company no more tolls are to be taken. But both in the case of the private individual which I have supposed, and of the Company, there is clearly a beneficial interest up to that time, and that, whether it be a gaining or a losing concern. It seems to me, therefore, that the land produces a profit, which is rateable, and that the defendants have not got rid of their liability, by shewing, as in *Rex* v. *The Inhabitants of Liverpool* (*a*), that it is applied to public purposes only.

WILLIAMS J.—The application of the profits in this case distinguishes it from those in which it has been held, that property of this kind is not rateable. In *Rex* v. *The Commissioners of the Navigation of Salter's Load Sluice* (*b*), which is the foundation of all the subsequent cases, it was found that by no possibility could the profits ever be diverted from purposes strictly public. That also was eminently the case in *Rex* v. *The Inhabitants of Liverpool*, for there the act of parliament expressed the purposes for which the dock dues were to be used. That case was followed in terms by *Rex* v. *The Trustees of the River Weaver* (*c*). The late case of *Rex* v. *The Mayor of Liverpool* (*d*) has been alluded to, where the rateability of borough property was under discussion; but the decision there went entirely upon the same principle, that property *cujuscunque generis*

(*a*) 7 B. & C. 61; *S. C.* 9 D. & R. 760.
(*b*) 4 T. R. 730.
(*c*) 7 B. & C. 70 n.; *S. C.* 9 D. & R. 788.
(*d*) *Ante*, 334.

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was to be rated, except that which was entirely devoted to public purposes.

COLERIDGE J.—This is a clear case. There is in the first instance a rateable property producing profits. The question is, whether there is a beneficial occupation or not; but that must be determined by inquiring whether the profits are applied to public purposes only, or whether there are any private interests mixed up with the general scope of the act.

Order of Sessions confirmed.

Saturday, February 2d.

A parish, obtaining an order for the removal of a pauper, must send with it, under s. 79 of 5 & 6 *Will.* 4, c. 76, the whole of the examinations taken before the justices, and not that part of them only on which the order was founded.

The QUEEN *v.* The Inhabitants of OUTWELL.

AT the general quarter sessions for the county of Norfolk, on an appeal against an order for the removal of *Penelope Bott* and her eight children from the parish of Outwell to the hamlet of March, the Court quashed the order, subject to the following case for the opinion of this Court.

The magistrates who made the order of removal took the examination of *Penelope Bott*, *John Bott*, the father of the pauper's husband, and *Charles Smith*, hair-dresser, of the hamlet of March, which stated a settlement as gained by the pauper's husband by apprenticeship in the appellant parish. Before making the order they also took the examination of one *William Clarke*, which referred to the hiring of some land by the pauper's husband in the respondent parish; but the magistrates made the order of removal upon the examination of the said *Penelope Bott*, *John Bott*, and *William Smith* only; and those were the examinations sent with a duplicate order of removal to the appellant parish, prior to the removal being made. The land as to which *William Clarke* was examined was the same tenement by hiring of which the Court adjudged the paupers to have gained a settlement in the respondent parish. The notice of the grounds of appeal was as follows:—

1st, Because the person or persons who acted as overseer or overseers in obtaining the said order, was or were not duly appointed.

2dly, Because a copy of all the examinations touching the settlement of the paupers, taken by the justices previous to signing the order, was not sent to us with the counterpart thereof.

3dly, Because the paupers are settled in the parish of Outwell.

It was contended on the part of the respondents that, as the notice of appeal did not deny the settlement set out in the examinations of *Penelope Bott*, *John Bott*, and *William Smith*, it must be taken to be admitted, and they need not give any evidence of that settlement; and the Court were of that opinion.

It was then objected by the appellants, that the examination of the said *William Clarke* ought to have been sent with the duplicate order of removal to the appellant-parish. But such objection was overruled by the Court, and the appellants proposed to give evidence of a settlement in the respondent parish by renting a tenement. The respondents objected to the terms of the notice of appeal being too general, and that such evidence could not be given. The Court, however, received the evidence and quashed the order, subject to the opinion of this Court upon the following points:—

1. If the examination of the said *William Clarke* ought to have been sent with the order of removal.

2. If, under the terms of the notice of appeal, evidence of the settlement in Outwell could be given.

If the Court should be of opinion that the examination of *William Clarke* ought to have been sent, then the order of sessions to be confirmed; if not, to be quashed.

If the Court should be of opinion that the sessions were wrong in admitting the evidence of the settlement in Outwell under the terms of the notice of appeal, the order of sessions to be quashed; if not, to be confirmed.

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Bere (with whom was *Byles*), in support of the order of sessions. The removing parish in this case ought to have sent all the examinations that were taken before the justices on making their order of removal. Sect. 79 of 4 & 5 *Will.* 4, c. 76, enacts, "that a copy of the examination upon which such order was made shall be sent by the parish officers of the parish obtaining the order;" that must mean the whole examination. [*Coleridge* J. Why do you labour this point, as you obtained the judgment of the Court below?] Their decision proceeded upon another ground, which perhaps is not supportable (*a*); it is therefore necessary to shew that they were wrong in their decision on the first point. Unless all the examinations are sent to the parish to which a pauper is removed, that parish does not get the benefit contemplated by the legislature, namely, full grounds for ascertaining whether an appeal ought to be made. In the present case it appears that a settlement in the respondent parish was first spoken to before the justices, and that, no doubt, was the settlement afterwards proved at the sessions. If the examination had been sent containing the evidence of that settlement, the appellant parish would have been enabled to point out the specific grounds of settlement on which they relied. (He was then stopped by the Court.)

Manning and *Palmer*, contrà. The word "examination," in sect. 79, can only be construed with reference to the order which is founded upon it. If a mass of irrelevant evidence is given before the justices, some discretion must be given to them as to what is to be sent. Sect. 82 shews that the sessions may direct such costs to be paid by the losing party as they deem reasonable; and sect. 83 enacts, that they may make either party pay costs for any matters included in the order or statement which the sessions may deem frivolous. That points out the necessity for the exercise of a sound discrimination as to what exa-

(*a*) See *Rex* v. *The Inhabitants of Derbyshire*, 1 N. & P. 703.

minations should be sent. [*Coleridge* J. Suppose a witness before the justices spoke to a settlement of the pauper in parish A., to which no heed was paid, and then proved another settlement in parish B., on which the order was made, would it be right to send the examination as to the latter settlement only?] The examination of a witness is entire, and therefore, perhaps, the whole should be sent. [*Coleridge* J. Then suppose that another witness proved the settlement in the first parish?] On principle there does not appear any ground for sending examinations on which the order is *not* made. Both the words and spirit seem to shew that all that was required to be sent was a copy of the evidence which induced the justices to make the order. If that appears to be insufficient, the parish to which it is sent may appeal. The taking the examination is not the act of the removing parish, but of the justices; and it does not even appear that the evidence of *Clarke* was taken down. That the removing parish should be also obliged to send evidence of settlements attempted to be proved in many different parishes, seems contrary to the common law maxim, that no person shall be bound to furnish evidence against himself.

LITTLEDALE J. (*a*)—It appears to me that the removing parish ought to have sent the examination of the witness *Clarke* as well as of the others, because *Clarke* spoke to the hiring of a tenement in the respondent parish, which, as it afterwards appeared by the opinion of the sessions, conferred a settlement. It is true that the other witnesses proved a settlement in the appellant parish, and that the justices acted upon their evidence; but I think it requisite, within the principle of the provision of the legislature, that the whole of the examination should be sent.

WILLIAMS J.—I have had some doubt in this case, but on the whole I think it is better to construe the rule strictly,

(*a*) Lord *Denman* C.J. was at the Privy Council.

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and to decide that the act is compulsory on the removing parish to send the examinations of all the witnesses. From what is stated, I must conclude that the evidence of *Clarke* had an important bearing on the question of the pauper's settlement, although not on the particular settlement which was established to the satisfaction of the justices.

COLERIDGE J.—Except for the doubts entertained by one of my learned brothers, I should have thought this a very plain case. These clauses are most beneficial to the public, and, having the laudable object in view to prevent needless litigation, should not be frittered away. What are the words of the act? "That no person shall be removed under any order of removal till 21 days after a notice in writing of his being so chargeable or relieved, accompanied by a copy of the order of removal of such person, and by a copy of the examination on which such order was made." *Examination* is nomen collectivum, and without any thing to explain it must mean the whole examination. The purposes of justice also require that the whole should be sent; for, if we were to decide that a portion only was sufficient, the inconvenient practice would be introduced of discussing at sessions what evidence was material, and what not. Besides which, the parish obtaining the order might be exposed to the temptation of withholding important examinations. But it is said that the removing parish is only bound to send the evidence on which the order of removal is made, and not to furnish evidence against itself; but I cannot bend to that argument, for the legislature may have intended, by requiring the copy of the examination to be sent, that the parish to which the pauper is removed may be put into possession of all the evidence elicited, in order to shape its future proceedings. It is then contended that, as section 83 enacts that, if either of the parties shall have included in the order or statement any frivolous grounds of removal or appeal, the justices may award costs, the clause shews that any ground of settle-

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ment but that on which the order is made ought not to be sent, as leading to unnecessary expense. But the order alluded to there is the order of justices, and the statement is the statement of the grounds of appeal, the examination of the witnesses not being alluded to at all. Which then is more likely to increase the expenses of an appeal, the withholding evidence and keeping parties in the dark as to the facts, or sending the whole examination, which may, indeed, prevent the appeal altogether? We do much better in holding that the removing parish has no discretion as to which of the examinations are to be sent.

Order of Sessions confirmed.

BROOKS *v.* STUART.

Monday, February 4th.

To a declaration against him, as maker of a promissory note, the defendant pleaded that the note was a joint and several note by defendant and *A.*, and that *A.* had been released. Replication, that *A.* had been so released at defendant's request, and that defendant, in consideration of such release, at his request, ratified the promise in the declaration,

ASSUMPSIT by the plaintiff, one of the public officers of the Lincoln and Lindsey Banking Company, against the defendant, as maker of a promissory note indorsed to the said Company. The declaration contained counts also for money lent, interest, and on an account stated. First plea; that at the time of the promises one *Watson* was, and still is, a partner in the said Company; that the said promises were made jointly by defendant and one *Agar;* that after the making of the said promises, to wit, on &c., by a certain indenture &c., *Watson,* being such partner and acting for the Company, released to *Agar* the causes of action in the declaration mentioned. Verification.

Replication as to the first plea, so far as it related to the cause of action in the first count of the declaration, that *Watson* executed the indenture, at the request of defendant, for the purpose of releasing *Agar* from the payment of the promissory note, and thereupon afterwards, the note being

and promised that he would remain liable on the note, as if there had been no such release:—Held, that the replication, setting up a parol contract to avoid the release, was bad.

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wholly unpaid, in consideration of the premises, and that *Watson* had, at the defendant's request, so released *Agar*, defendant ratified and confirmed the promise in the first count mentioned, and promised the Company that he would be and remain liable to the Company on the promissory note, as if the indenture had not been made. Verification.

Special demurrer, on the ground that the replication was a departure from the first count, the latter alleging the ordinary promise resulting from the making of a promissory note, and the replication alleging a new promise, founded on a new and distinct consideration; and also that the replication was defective in this,—that the plaintiff should have either relied upon the alleged ratification of the promise in the first count, or upon the alleged promise that the defendant would remain liable on the promissory note, and not upon both, by which mode of pleading the defendant had been prevented from taking a single conclusive and distinct issue; and also that the subject-matter of the replication, if pleadable at all, was in the nature of an estoppel, and should have been pleaded as such, &c. Joinder in demurrer (*a*).

Martin, in support of the demurrer. The release by *Watson* enures of course as a release by all the partners; *Ruddock's* case (*b*); nor can it be disputed that the release to *Agar* was a release to the defendant also as his co-contractor (*c*); and this effect of the release cannot be defeated by a mere parol agreement; 2 *Wms. Saund.* 47 *s*, n. 1, and *Cocks* v. *Nash* (*d*). The subsequent promise is altogether bad, for want of consideration. "The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay; and in an action upon the case, the matter was found specially; and *Rolls* argued that the debt was not absolutely discharged, but only sub modo, viz.

(*a*) Another replication was also demurred to on the ground of duplicity. *R. V. Richards*, for the plaintiff, admitted that it could not be sustained.

(*b*) 6 Rep. 25 a.

(*c*) 5 Bac. Abr. 624, tit. Release (G.)

(*d*) 9 Bing. 341.

if the other can have the release to plead, and because the forbearance was a good consideration. But the Court was of opinion that the debt was absolutely discharged, and therefore the consideration was insufficient:" *Hargrave's Co. Lit.* note 144 to 232 a, referring to *Hob.* 70. Even, however, if the replication is good in substance, it is a clear departure from the first count.

R. V. Richards, contrà. The replication is clearly good in substance. Assuming *Cocks* v. *Nash* (*a*) to be good law, it shews only that the mere assent of one obligor to the release of the other is not sufficient. In this case there is a distinct promise. With respect to the alleged departure, the replication obviously fortifies the count, by shewing in what manner the promise therein contained is still in force, notwithstanding the primâ facie effect of the release. So, where the Statute of Limitations is pleaded, proof of a new promise sustains the declaration; or, if it can be objected that, as the statute bars the remedy and not the debt, there is no analogy between the two cases, subsequent promises by a certificated bankrupt, or an infant on his majority, may be referred to as shewing that the replication of such promises fortifies the declaration on the original promise. The defendant in effect is shewn by the replication to have agreed that the release should not be made use of to defeat his original promise. *Irving and another* v. *Veitch* (*b*) also may be cited as an authority that the promise in this replication should not have been declared upon as a new promise (*c*).

The COURT (*d*) held the replication bad, as setting up a parol contract to avoid the release.

Judgment for defendant.

(*a*) 9 Bing. 341.
(*b*) 3 M. & W. 90.
(*c*) See *Meyer* v. *Haworth*, 3 N. & P. 462.
(*d*) Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge*, Js.

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Monday, February 4th.

IBBS *v.* RICHARDSON and another.

Lessee of a term underlet the demised premises, and his undertenant held over for a portion of a year after the expiration of the term, against the will of the lessee, so that he could not give up possession to his lessor. During such holding over lessee distrained upon the undertenant for rent previously due: Held, that lessee was liable, in use and occupation, for the period of the under-tenant's holding over, but not for a whole year's rent.

DEBT for use and occupation. Plea: Nunquam indebitatus, and issue thereon.

The following special case was stated under 3 & 4 *Will.* 4, c. 42. Mrs. *Ann Maria Hughes* being in the occupation of certain premises of the plaintiff, hereinafter described, on the 3d December, 1827, a deed, (which was admitted to be a lease,) was executed by her and the plaintiff, by which the plaintiff demised to her the said premises for eight years, to commence from the 11th October preceding, at a yearly rent of 20*l.* From and after the execution of this lease, the said *Maria Hughes* continued in possession and occupation of the said premises, upon the terms therein mentioned, until her death, which took place in the beginning of February, 1829. The defendants are the executors of the said *Ann Maria Hughes*, who have proved her will and acted in the execution of the disposition thereof. After the death of the said *Ann Maria Hughes*, the defendants, as such executors, wished and proposed to the plaintiff to surrender the said premises to him, but the plaintiff, believing that by the said instrument a term of eight years was created, refused to accept such surrender. Thereupon the defendants underlet the said premises to *Robert Craik* from year to year, subject to the determination of their interest therein as such executors, at the same yearly rent of 20*l.*, and the said *Craik* entered into the possession and occupation of the said premises, as their undertenant, and continued in the occupation thereof until the 14th day of December, 1835, under the circumstances hereafter mentioned. The original rent has been duly paid to the plaintiff by the defendants up to the 11th day of October, 1835. On that day, the defendants being desirous of delivering up possession of the said premises to the plaintiff, demanded possession, by their agent, from their undertenant, the said *Craik*, but the said *Craik* refused to

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quit, and continued against the defendants' will to occupy, by retaining his goods upon the premises. On the 16th day of the same October, 10*l.* rent being in arrear from the said *Craik* to the defendants, they, by their agent, distrained upon goods of the said *Craik*, remaining upon the premises in question until the 22d day of the same month.

After, as well as during the continuance of the distress, defendants, by their agent and attorney, endeavoured to induce the said *Craik* to quit the premises, and on the 14th day of December following he did quit the same.

No rent or compensation of any kind has been received by the defendants, for the period between the 11th day of October and the 14th day of December, 1835. The plaintiff was aware of all the circumstances hereinbefore stated, but no direct communication took place between him and the defendants, or their agents, until the said 14th day of December, 1835. On that day the key of the said messuage and possession of all the said premises were offered by the agent of the defendants to the plaintiff. The plaintiff, however, refused the key, unless the defendants would pay a quarter's rent; but the plaintiff stated, that if the defendants would then pay a quarter's rent he would take it, and accept the key and release the defendants from all liability. The agent of the defendants refused to make such payment, and the key remained in his possession, and the said premises have not been, in fact, occupied from that time up to the 11th day of October, 1836. The pleadings are to be considered as part of the case, and may be referred to accordingly, and the Court is to have power to draw any inference from the facts above stated which a jury might draw.

B. Andrews for the plaintiff. The defendants are liable for a year's rent. There was no privity between the plaintiff and *Craik*, and the defendants are properly sued for use and occupation. Where lands are agreed to be let to *A.*, who suffers another to occupy, *A.* is liable for use and

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occupation; *Bull* v. *Sibbs*(*a*). So in *Harding* v. *Crethorn*(*b*), which was also an action for use and occupation, Lord *Kenyon* held that "when a lease is expired, the tenant's responsibility is not at an end; for if the premises are in possession of an undertenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved that the lessor had accepted the undertenant as his tenant, &c." Here there is no pretence for saying that the plaintiff ever accepted *Craik* as his undertenant. The defendants are liable, not only to the time when they tendered the key, but, as they have acted as owners, by distraining, they may be considered tenants down to the 11th October, 1836.

Platt, contrà. It is not necessary to contravene the authority of *Bull* v. *Sibbs*(*a*), for it does not apply. In that case there was a question, whether there ever had been any agreement at all between the plaintiff and defendant respecting the occupation of the premises. The jury found that there had been such an agreement, and also, that the actual occupant was undertenant to the defendant. Here, there is no question that the relation of landlord and tenant once subsisted between the plaintiff and the defendants: but the whole evidence shews that, after its regular expiration in October, 1835, it was not renewed by *Craik* occupying as their undertenant, for he occupied against their will. *Harding* v. *Crethorn*(*b*), was a nisi prius decision, and the defendant had a verdict, so that the doctrine of Lord *Kenyon* C. J. was not brought into question afterwards; and, in that case also, it did not appear that the actual occupant retained possession against the will of the defendant. If an action of mesne profits were brought against the defendants, the illegal intrusion relied upon would be the occupation by *Craig*, and it would therefore

(*a*) 8 T. R. 326. (*b*) 1 Esp. 57.

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be a defence, to shew that he occupied *against* their consent. The plaintiff is not without remedy; he might have brought use and occupation against *Craik*, but his continuance in possession, in defiance of the defendants, cannot make them responsible in this form of action. They could have no reversion so as to authorize a distress, for if any new tenancy was created by *Craik's* holding over, it was for the year, and commensurate with their own tenancy.

B. Andrews, in reply, cited *Pinero* v. *Judson* (*a*) to shew that use and occupation lies for a constructive as well as for an actual occupation.

Lord DENMAN C. J.—The plaintiff is entitled to recover. The defendants continued in possession after the expiration of their term. It is immaterial that they could have no reversion, they chose to consider themselves as tenants, and to treat *Craik* as their undertenant, by distraining on him. But I think that they are liable only up to the 14th December, when they offered to deliver up possession to the plaintiff, and that he should have judgment for a corresponding portion of the rent only.

LITTLEDALE J.—If the premises had been recovered from *Craik* in ejectment, the plaintiff might afterwards have brought an action for mesne profits against him, and recovered them up to the 14th December, when possession was given up. As to the action for use and occupation, the occupation of *Craik* is that of the defendants. They were bound to give possession at the end of their term, and must be liable to some kind of proceeding for not doing so, as to a special action for not so giving up the possession. Suppose, then, they had themselves remained in actual occupation till the 14th December, after the expiration of their tenancy; if the expired tenancy had been from year to year they would have rendered themselves liable for a whole

(*a*) 6 Bing. 206.

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year's rent; but as the tenancy was for a term, they are liable for that portion of time only for which they held over.

WILLIAMS and COLERIDGE, Js. concurred.

Judgment for the plaintiff.

Tuesday, February 5th.

The power of appeal against a borough rate under 5 & 6 *Will.* 4, c. 76, is confined to the grounds of appeal against a county rate, under 55 *Geo.* 3, c. 51, s. 14, and therefore an individual cannot appeal for any personal grievance, or on the ground of the rate being retrospective.

The QUEEN *v.* The Recorder of BATH.

ADDISON, in Michaelmas term, had obtained a rule calling upon the defendant to shew cause why a mandamus should not issue, commanding him to cause continuances to be entered to the next quarter sessions of the peace, upon an appeal of one *W. P. Roberts* against a borough rate.

The affidavit of Mr. *Roberts*, on which the rule was obtained, stated that, on the 14th July, 1838, a borough rate was made for the city and borough of Bath for the sum of 6866*l.* 2*s.* (which was admitted to be a good rate on the face of it), and which was apportioned amongst the several parishes of Bath. Immediately after the rate was made, the deponent, being a rate-payer and a person aggrieved by the rate, entered an appeal against the rate at the then next borough sessions, and gave all the requisite notices. On the hearing of the appeal before the recorder the appellant stated that the town council had ever since their existence exceeded their income, and that, on the 17th July, 1837, they had incurred a debt of 8035*l.* 13*s.*, to pay which they had, on the 10th January, 1838, under 1 *Vict.* c. 81, levied a retrospective rate for 6050*l.* 14*s.*, leaving a debt of nearly 2000*l.* still due from the council: that they had continued the same rate of expenditure, and had made no borough rate to meet such excess of expenditure beyond their income, or to pay the balance of 2000*l.*: that the council, on the 14th July last, were again in debt to the amount of 4000*l.* or 5000*l.*, and that the rate on those

days was made to discharge the debt as well as the prospective expenses of the borough; and the appellant then stated to the recorder, that this rate was at least 4000*l.* greater than it would have been if the town council had cleared their debts due on the 17th July, 1837, under the 1 *Vict.* c. 81, s. 2; and that such rate, though in form prospective, was not so in fact, but only colourably so, and was in a great measure retrospective. The recorder was of opinion that he had no jurisdiction, and that his power was exactly similar to that of the county quarter sessions with regard to county rates, and that no county rate could be appealed against on that ground, and he accordingly dismissed the appeal.

Sir *W. W. Follett* and *Hodges* shewed cause in Michaelmas term last (*a*). The rate complained of in the present case is good upon the face of it, and the objection to it, made by an individual rate-payer, is, that it is bad in fact, because it is to be applied to old debts. The question is whether, under s. 92 of 5 & 6 *Will.* 4, c. 76, an individual rate-payer has any right of appeal under such circumstances. That section enacts, "that any person who shall think himself aggrieved by any such rate may appeal to the recorder at the borough sessions, who shall award relief in the premises as in the nature of a county rate." Now, on turning to the statute which regulates appeals against county rates, 55 *Geo.* 3, c. 51, s. 14 (*b*), it appears that the only cases where relief can be awarded on a county appeal is where a whole *parish* is overrated, or unequally rated, or omitted from the rate; and in such case the sessions are empowered to alter so much of the rate as regards the particular parish. It is evident that this enactment does not embrace the case of an individual, and so it has been decided; *Rex* v. *The Justices of Westmoreland* (*c*). The

(*a*) Nov. 24th, before Lord *Denman* C. J., *Patteson* and *Williams* Js. *Coleridge* J. was in the Bail Court.

(*b*) See the section set out in the judgment of the Court, *post*.

(*c*) 10 B. & C. 226.

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question of what is a personal grievance under this section of the Municipal Act was discussed in *Rex* v. *The Recorder of Poole* (*a*); but in the present case it is clear that the appellant had no grievance but what was shared by all the inhabitants of the borough, and therefore the recorder could not afford *him* any relief. If the appellant had been personally aggrieved by the rate, or if one of the parishes of which Bath consists had been overrated, then the jurisdiction of the recorder would have accrued. Or it may be contended that the word "person," in s. 92, does not include individuals at all, except in extra-parochial districts, where there are no parish officers, in which case, under 55 *Geo.* 3, c. 51, individuals may appeal; and that in all other cases it means parish officers, just as in *Cortis* v. *The Kent Waterworks* (*b*), and *Boyd* v. *The London and Croydon Canal Company* (*c*), "persons" was held to include corporations. But suppose that an individual might appeal in this case as a parish can on a county rate, still, as the ground of the appeal is that the rate is retrospective, and the rate is good upon the face of it, it would make the recorder the judge of the acts of the council, if he had jurisdiction over the appeal. If the rate were retrospective on the face of it, then no distress warrant could issue upon it, which was the case of *Woods* v. *Reed* (*d*); but if the rate is good on the face of it, then the council would have no power to apply it retrospectively; or if such was the intention of the council, the rate-payers might refuse to pay the rate; and, under 1 *Vict.* c. 78, s. 44, any order of the council so appropriating the rate would be removable by certiorari. [*Patteson* J. The certiorari is taken away by sect. 132 of 5 & 6 *Will.* 4, c. 76.] It is restored by the subsequent statute. [*Patteson* J. That is only with respect to orders for payment of money out of the borough fund. This money would not come out of the borough fund.] Then equity would give a remedy; for it has been decided

(*a*) 1 N. & P. 756.
(*b*) 7 B. & C. 314.
(*c*) 4 Bing. N. C. 669.
(*d*) 2 M. & W. 777.

that the Lord Chancellor would interpose if any malversation takes place by the council. In *Rex* v. *Sillifant* (*a*) the Court threw out an opinion, that a rate good on the face of it is not bad because the proceeds are to be applied to a past debt. If the rate is retrospective on the face of it, no doubt this Court would quash it; *Rex* v. *Justices of Flintshire* (*b*); but there is no instance of such a rate being appealed against on this point. And *Rex* v. *The Mayor of Gloucester* (*c*) shews how unwilling the Court is to inquire whether a rate is retrospective or not; for there, although the rate was to be applied retrospectively, as it was good in form, the Court would not quash it.

Addison, contrà. The last case cited is no authority on the question, for it turned entirely upon the question whether the rate was made in conformity with the provisions of the act. It also affords an answer to the argument, that objections to the rate can only be taken on certiorari. When the rate is bad on the face of it, then certiorari is the proper course; but, when it is bad by matter *dehors*, then appeal is the proper and only mode of bringing it before the Court. The argument on the other side is that, as an appeal against a county rate is given to overseers only, so also is the appeal against a borough rate; and for this reason the word "person," in s. 92, is stated to mean overseers; but it should be shewn also that it means overseers only, which is impossible. Then it is said that only the same relief can be afforded on a borough appeal as on a county appeal, and that the only ground for appealing in the latter case is for an inequality of rate; but that is not so, for the county rate may be appealed against for overrating any particular parish, which is the case here. *Rex* v. *The Justices of Westmoreland* (*d*) destroys the argument on the other side, for it was held there that the appeal did

(*a*) 4 A. & E. 354; *S. C.* 5 N. & M. 640.
(*b*) 5 B. & Ald. 761; *S. C.* 1 D. & R. 470.
(*c*) 5 T. R. 346.
(*d*) 10 B. & C. 226.

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not lie, because the whole parish was not affected; but here confessedly the whole parish is equally affected with the appellant. The present rate is clearly bad for being retrospective. The last case on the subject is *Woods* v. *Reed* (*a*), where, it is true, the rate was bad on the face of it; but if it can be shewn to be bad, why should not any rate-payer, under this appeal clause, be allowed to shew it to be so? Appeal clauses are entitled to a liberal construction, and the legislature only intended that the language of the 55 *Geo.* 3, c. 51, should be applied *cy près*. The county rate and the borough rate are perfectly distinct in their nature; the latter is applicable to items of a much more multifarious character: it is therefore evident that more numerous grounds of appeal may arise upon it. Then, again, the parties who make the rate in the county are the magistrates, with scarcely any interest, and the legislature has such confidence in them, that it directs the appeal to themselves; but in boroughs it is the council who make the rate, and who may vote the proceeds to themselves in salaries, &c. Lastly, the rate is required, by s. 92, to be made in addition to the borough fund; but it is clear that this rate is not in addition to it, but to clear off a debt incurred, which also makes the rate bad. A dictum in *Rex* v. *Silliſant* (*b*) has been relied upon, but the Court only threw out there that, if the rate were retrospective, that would be an objection in the Ecclesiastical Court, and properly; for, as that Court had jurisdiction, the Court of King's Bench could not interfere. So also it is said a Court of Equity may interfere. No doubt it would if there were any fraud or corruption, but that is not what is complained of. As to the power of the prosecutor to resist the rate, what remedy is that to a party leaving the borough?

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the

(*a*) 2 M. & W. 777.

(*b*) 4 A. & E. 354; *S. C.* 5 N. & M. 640.

Court.—This was an appeal against a rate, made for the city and borough of Bath, by a rate-payer, liable to contribute to the same, and who had given due notice of his intention to appeal against such rate. The appeal having been entered at the next quarter sessions, held at Bath on the 16th day of July last, and respited, came on for hearing at the following sessions, held on the 9th day of October last, before the recorder of the said city and borough. The appellant having upon that occasion stated several objections (apparently of considerable importance) against the said rate, the recorder expressed his opinion to be that he had no jurisdiction to try the case; and whether that opinion is correct or not, is the question. And this depends upon the proper construction to be put upon the 5 & 6 *Will.* 4, c. 76, s. 92, and the 55 *Geo.* 3, c. 51, s. 14. And here, as it seems to us hardly possible to suppose it to have been the intention of the legislature that an individual interested and aggrieved should not have the power of questioning the validity of a rate at the sessions, we cannot avoid noticing with regret that recourse should have been had to the method of giving an appeal by reference to another statute, instead of giving it plainly and directly by the statute itself. The former course, however, has been pursued.

The 92d section, then, of the first-mentioned act, which authorizes the imposition of a borough rate, gives an appeal in the following words, as applicable to the present case:—"And if any person shall think himself aggrieved by any such rate, it shall be lawful for him to appeal to the recorder at the next quarter sessions of the borough for which such rate has been made, and such recorder shall have power to hear and determine the same, and to award relief in the premises *as in the case of an appeal against any county rate.*"

It becomes necessary therefore to ascertain with precision what *is* the relief which *may* in that case be awarded. And this depends upon the 55 *Geo.* 3, c. 51, sect. 14, which

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is as follows:—If the churchwarden, overseer of the poor, or other *inhabitant* of any parish, township or place, whether parochial or otherwise, *where there is no churchwarden or overseer, or person appointed to act as such*, shall at any time have reason to think that such *parish, township* or place is aggrieved by any rate now existing or hereafter to be made, either in pursuance of this act or of any act or acts now in force, whether it be on account of the proportions assessed upon the respective *parishes, townships or places* being unequal, or on account of some one or more of them being, without sufficient cause, omitted altogether from the rate, or on account of such *parish, township or place* being rated at a higher proportion of the pound, according to the fair annual value of the rateable property therein, or on account of some other *parish* &c. being rated at a lower proportion of the pound sterling, according to the fair annual value of the rateable property therein, than has been fixed and declared by the justices of the peace of the said county in sessions assembled, as the basis of the rate of the said county, or on account of any other just cause, it shall be lawful for such *churchwarden* &c. to appeal to the quarter sessions against such part of the rate only as may affect the *parish* &c. which are unequally rated, or which shall appear to be over-rated or under-rated, or omitted altogether from the rate; and the said justices are empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or *to correct such inequalities, disproportions or omissions as shall be proved to exist therein.*"

And, from a perusal of this clause, it is perfectly obvious that the appeal is given to remedy total omissions of parishes from the rate, or inequalities and disproportions (in relation to each other) in their contributions thereto, and nothing else. *Individual* grievances, arising from unequal and disproportionate impositions in each of the parishes, townships or places, are nowhere mentioned or even alluded to. The grievances and complaints of the *whole*

parish, township or place only are noticed. And accordingly the appeal is given exclusively to the public officer of the district or division, the churchwarden or overseer. When the word "inhabitant" is used, it is not to be understood as being applicable to *any* individual, but to such only as, for the purpose of appeal, represents some place where the clause supposes neither churchwarden nor overseer to exist, and who must therefore be understood to be placed upon the same footing as churchwardens and overseers.

"The relief therefore to be awarded" at the borough sessions being expressly declared to be such "as in the case of an appeal against any county rate," and that being restricted in the manner we have seen, we are reluctantly driven to the conclusion that an appeal did not lie to the Quarter Sessions of Bath, and that therefore the rule must be discharged.

Rule discharged.

LAPIERRE *v.* M'INTOSH.

Tuesday, February 5th.

If an alien artificer takes possession of a dwelling-house under an agreement in writing, which provides for the granting of a future lease, the instrument being illegal under 32 *Hen.* 8, c. 16, the lessor may enter at any time and eject the tenant, although the instrument do not amount to a lease.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and expelling him from the possession thereof. Pleas: 1. Not guilty: 2. That before the said time when &c., and before the plaintiff had anything in the said dwelling-house in which &c., the defendant was and still is seised in his demesne as of fee, of and in the said dwelling-house &c., and that plaintiff, before and at the time of making the agreement hereinafter mentioned, was and still is a stranger, artificer and handicraftsman, to wit, a boot and shoemaker, born out of the obeisance of the king of this realm, to wit, in the kingdom of France, and not a denizen and naturalized, and thereupon before either of the said times when &c., to wit, on the 30th August, 1834, by a

Quære, whether the bare entry on the premises of a tenant at will, during his absence, and without his leave, by the lessor, is sufficient to determine the will.

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certain agreement in writing then made between the defendant and the plaintiff, it was wilfully and contrary to the statute in such case made, agreed as follows; that is to say, the defendant agreed to let the said dwelling-house, situate in the county aforesaid, to the plaintiff, and to grant a good and valid lease thereof, for the term of twenty-one years, unto the plaintiff, his heirs &c., at the clear yearly rent of 70*l.*, payable quarterly, the said lease to commence from Michaelmas then next, such lease to contain all usual and proper covenants and clauses, especially to paint all external work &c., the plaintiff to pay sewers' rates, and all other rates and taxes &c., the insurance only excepted; and plaintiff thereby agreed to take the said house, and to accept the said lease at the said rent of 70*l.* per annum, containing the above-mentioned covenants, and to execute a counterpart thereof; the said lease to be determinable at the expiration of the first seven or fourteen years of the said lease, on the plaintiff giving six months' previous notice thereof in writing. And the defendant further saith, that afterwards and before either of the said times when &c., to wit, on the 30th August, 1834, aforesaid, the defendant, at plaintiff's request, delivered to the plaintiff the possession of the said dwelling-house in which &c., and plaintiff then took and at the times when &c., continued in and had possession thereof, on the faith and terms of the said agreement, and with the view and intention that the said agreement should be carried into execution, and the said last-mentioned lease granted as aforesaid, and not otherwise; whereupon the defendant, at the said times when &c., entered into the said dwelling-house in which &c., the outer door thereof being open, and no person being then therein of whom the defendant could demand possession of the said dwelling-house, as he intended to do &c., and committed the several trespasses in the declaration mentioned, as he lawfully might &c. Verification.

Special demurrer, setting out for cause that the instrument mentioned in the plea is not a lease, but an agreement for a lease, and the ground of demurrer stated that the 32

Hen. 8, c. 16, only avoids *leases* of the permanent interests in a dwelling-house to an alien artificer, and that the instrument stated in the plea is not a lease, nor gives nor grants any permanent interest.

C. Jones, in support of the demurrer. The validity of this plea on the 32 *Hen.* 8, c. 16, depends on the question whether this instrument amounts to a lease or an agreement, as that statute only makes void actual leases. It is submitted to be only an agreement, as it contains no words of present demise; it is uncertain when the period is to begin, and it clearly refers throughout to a lease subsequently to be executed. The cases on the subject are collected in *Staniforth* v. *Fox* (*a*) and *Doe* v. *Reis* (*b*). (The Court then called on *Chandless*.)

Chandless, contrà. Even if this be not a lease, still a tenancy at will was created, and therefore the landlord was entitled to enter upon him, and consequently is entitled to the verdict. [*Littledale* J. What is there to determine the will? Something express is required, as appears by *Com. Dig.* Estates, (H 6), a mere entry on the demise by the landlord is equivocal.] That passage in *Comyn* ub. sup. is relied upon, where it is laid down that if the lessor does a wrongful act it amounts to a determination of the will. Now the complaint is, that the plaintiff's entry is wrongful. In *Co. Litt.* 55, it is laid down that the lessor may determine the tenancy at will by entry, in the absence of the lessee, it is clear, therefore, that no declaration of intention is necessary. If, therefore, this agreement does not amount to a lease, the landlord might enter at any time and turn him out, *Hegan* v. *Johnson* (*c*); but it is submitted that it is a lease.

C. Jones replied.

(*a*) 7 Bing. 590.
(*b*) 8 Bing. 178.
(*c*) 2 Taunt. 148.

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Lord DENMAN C. J.—It appears to me very questionable whether this instrument amounts to a lease, and whether the landlord had expressed any determination of the tenancy at will, so as to authorize him to enter. But it is averred in the plea that the plaintiff took and continued in possession of the dwelling-house on the faith and terms of the agreement, with the view and intention to carry it into effect; now as the agreement was unlawful, the possession under it was also unlawful, and therefore the defendant was justified in making the entry in the manner pointed out in the plea.

LITTLEDALE J.—In whatever view we regard this instrument, the defendant is entitled to judgment. If it amount to a lease, to commence at a future day, then it is unlawful under the statute; if possession under it constituted a tenancy at will, then the lessor has always a right to enter upon his tenant and eject him; but without inquiring whether sufficient was done here to amount to a determination of the will, it is quite clear that the agreement was unlawful, and therefore whether it was a lease or not, the plaintiff could acquire no interest under it.

WILLIAMS J.—I will not inquire whether this be a lease or not, but the allegation that the agreement was to be carried into execution shews the intention of the parties to defeat the statute, which makes the instrument illegal.

COLERIDGE J. concurred.

Judgment for the defendant.

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STORR and another *v.* LEE and Wife.

Wednesday, February 6th.

In an action against husband and wife, for a debt contracted by her before coverture, they may plead her discharge, while a feme sole, under the Insolvent Debtors' Act.

DEBT, for goods sold and delivered to *Ellen Jane*, before marriage with the defendant.

Third plea: The defendants say, that whilst the said *Ellen Jane* was sole and unmarried she was duly discharged according to the Act for the Relief of Insolvent Debtors, 7 *Geo.* 4, c. 57, of and from all the debts and causes of action in the declaration mentioned.

Demurrer and joinder.

E. V. Williams, in support of the demurrer. The plea is bad: defendant and his wife are both liable to be sued for debts contracted by her before the marriage, although she has been discharged from them under the 7 *Geo.* 4, c. 57. If they cannot be sued the creditors are without remedy, for the machinery of the Insolvent Act, by which the future effects of a discharged debtor are to be taken in payment of his debts, is not applicable to a female who marries after her discharge under the act. By section 57 a prisoner, before discharge, is required to execute a warrant of attorney, to confess judgment for the amount of debts in his schedule, on which the Insolvent Court may permit execution to be taken out when the insolvent becomes of ability to pay. This section is paralized in the case of an insolvent female, marrying after her discharge, unless her husband is chargeable, for her property vests in her husband, so that *she* cannot be said to have ability to pay, although a large fortune should devolve upon her. The condition of the prisoner's discharge was, that she should give a warrant of attorney, which of course must mean such a warrant of attorney as would be effectual; the warrant of attorney, therefore, which she has rendered ineffectual by her marriage, cannot be considered as fulfilling the condition of her discharge. But if the wife could plead her discharge, there is nothing in the act to enable her husband

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to join. The 61st section enables a person who has been discharged, his or her heirs, executors or administrators, to plead such discharge, and no power is given to the husband of a discharged insolvent to join in the plea. Perhaps she might under the act have pleaded separately. In *Lockwood* v *Salter* (*a*), it was held to be a good plea to a declaration against husband and wife, for a debt due from the wife before coverture, that the husband had been discharged under the Insolvent Acts; that is the converse of the present case; but it seems to have proceeded upon the authority of *Tampion* v. *Newson* (*b*), where it was held, not that husband and wife must join in the plea, but that the wife cannot plead alone. By sect. 72, a married woman can obtain her discharge separately, but the husband is not thereby discharged of his liability. The debts of the wife are discharged by the husband's bankruptcy, *Miles* v. *Williams* (*c*), because he has all her property which would be available for payment of them. The general rule of law is, that the husband is chargeable with all debts contracted by his wife, whether before or during coverture. What is there in this case to discharge him?

R. V. Richards contrà. If the insolvent had remained sole her discharge would have protected her, and the object of the act will be defeated if her liability is to re-attach on her marriage. The remedy of the creditors under the act is not altogether lost, it is only suspended. It may undoubtedly be very hard upon them, that the husband should not be liable for the debts of his wife, although he may have come to a large fortune in her right; but it would be hard upon him that he should be liable, after her discharge, although she had brought with her no fortune whatsoever. As the wife cannot plead alone, her husband must join in the plea; *Lockwood* v. *Salter* (*a*).

(*a*) 5 B. & Ad. 303.
(*b*) Cro. Jac. 288.
(*c*) 1 P. Wms. 249.

E. V. Williams in reply. The husband would be clearly liable for the debts contracted by his wife, before coverture, were it not for the Insolvent Act. The question then is, whether her debts are barred by this act. Now the act certainly does not bar her debts, but merely prescribes, for recovering payment of debts generally, a mode which is not applicable to a case like the present.

Lord DENMAN C. J.—This seems a state of things not contemplated by the statute. The 57th section is clearly inapplicable. The 61st section gives the insolvent power of pleading her discharge. In the case of an insolvent female, who marries after discharge, that power of pleading must be given her, in the only way in which it can be exercised, jointly with her husband.

LITTLEDALE J.—It is said there will be great hardship on the creditors, if the husband be not made liable, although he might receive a large fortune with his wife; but it would be equally hard the other way, if he were to be made liable, although he might get nothing.

COLERIDGE J.—This seems to be a casus omissus. The insolvent having performed all the conditions of the act, is entitled to her discharge, and all right of action is gone against her, if she avails herself of the plea given by the 61st section. It is said that, as she is married, she cannot plead her discharge, nor her husband either; I think that she was entitled to plead her discharge, and that her husband was entitled to join her.

Judgment for the defendants.

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ACKLAND v. LUTLEY.

TRESPASS. 1st count, for breaking and entering the plaintiff's dwelling-house and premises at Buckland, in the county of Somerset, and expelling him therefrom; 2d count, for taking the goods of the plaintiff, to wit &c., and placing the same on a common highway, in &c., without leave or licence; 3d count, for taking away the trees of the plaintiff. Pleas: 1, not guilty; 2, to the breaking and entering in the 1st count mentioned, and taking away the trees in the 3d count mentioned, that the plaintiff was not possessed of them modo et formâ; 3, to the 1st count, that the premises therein mentioned were the soil and freehold of *William Braddick*, and justification as the servant of *Braddick;* 4, as to the taking the goods in the 2d count mentioned, that one *Pring* was lawfully possessed of a certain close, in the county aforesaid, adjoining the said highway in the 2d count mentioned, and because the said goods were wrongfully upon the said close incumbering the same, and doing damage there to the said *Pring*, the defendant, as the servant of *Pring*, and by his command, took and seized the said goods &c., and placed the same in and upon the said highway, being within a small and convenient distance. Verification. 5, a similar plea to the 2d count, as the servant of *Braddick;* 6, a similar plea to the 2d count, as the servant of one *Toler*.

Replications: Similiter to the 1st and 2d pleas. To the 3d plea, a traverse and issue thereon. To the 4th, 5th, and 6th pleas, de injuriâ.

At the trial at the Somersetshire spring assizes, 1837, before *Littledale* J., a verdict was taken for the plaintiff with 600*l.* damages, and the cause was referred to a barrister.

1. Where a lease is to commence *from* the 25th of March then next, for twenty-one years, fully to be complete and ended, the term does not end until the last moment of the 25th March in the last year.

2. A lessee who had paid his rent occasionally to a trustee, and occasionally to a cestui que trust, gave up possession on the last day of his term, but before his term was over, to the person who had been trustee, and not to the party then having the legal title:—Held, that, as the act was equivocal, it did not amount either to a surrender or to a forfeiture of the term.

3. Devise of freehold premises to trustees to *set and let* the premises, and out of the rents and profits thereof to pay a debt, and in the next place to pay certain legacies, as soon as the rents and profits would permit, and after the debt and legacies were paid off, to *R. B.* in fee:—Held, that the trustees took only a chattel interest, for that the power of leasing was expressly confined to the purpose of paying off the debt and legacies.

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The arbitrator stated the following facts on his award:— One *James Troake* being seised in fee of the dwelling-house with the appurtenances, and of the stable, barn, and other buildings, and of the lands and tenements mentioned in the declaration, by his will, duly attested for the purpose of passing real estates, devised the same as follows: "to *Robert Blackmore* and *William Braddick*, upon the trusts, and to and for the intents and purposes thereinafter mentioned and declared concerning the same; that is to say, upon trust that they the said *R. Blackmore* and *W. Braddick*, and their heirs, do and shall set and let the said premises, and out of the rents and profits thereof do and shall, in the first place, pay off and discharge the sum of 101*l.* 10*s.* 6*d.* which I do owe *Mary Dyer*, my servant; and in the next place do and shall pay unto *Mary*, *Hannah*, *Richard*, *James* and *Joan*, sons and daughters of my late nephew *R. Blackmore*, deceased, the sum of 10*l.* a piece of like lawful money, to whom I give the same, to be paid unto each of them by my trustees, as soon as the clear rents and profits of the premises will admit of, the eldest of them to be paid first, and so on in rotation, one after the other; and from and after the debt due to *Mary Dyer*, and the five legacies to the aforesaid children of my nephew *R. Blackmore* are paid off and discharged, I give, devise and bequeath the same unto *John Blackmore*, son of the said *R. Blackmore* deceased, to hold the same premises, with the rights, members and appurtenances thereof, unto the said *John Blackmore*, his heirs and assigns, for ever."

The testator, *James Troake*, died in 1811; previously to his death he granted a lease of the said premises to one *Thomas Pring*, for twenty-one years (*a*), from the 25th March, 1809, at the yearly rent of 30*l.*, under which lease

(*a*) The habendum of the lease was, "to hold &c. *from* the 25th day of March then next, for and during and unto the full end and term of twenty one years fully to be completed and ended." The reddendum was to be on the 24th June, the 29th September, the 25th December, and the 25th March.

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Pring entered and occupied till his death, which happened some time before this action was brought. On the death of *James Troake*, *John Blackmore*, the devisee, received the rents of the premises of *Pring*, the tenant, till Lady-day, 1816, when he sold the same to *Richard Ackland*, the plaintiff, whose daughter he had married, but the premises were not actually conveyed to the plaintiff till the 20th of July, 1817. The plaintiff received the rent of *Pring* from the time of his purchase at Lady-day, 1816, till Christmas, 1817, when the trustees, *R. Blackmore* and *W. Braddick*, received the rents till the death of *R. Blackmore*, in May, 1824, from which time *W. Braddick*, the surviving trustee, alone received the rents till Lady-day, 1829. *R. Blackmore*, by his will, made *Edward Lutley*, the defendant, and *George Braddick*, the son of *W. Braddick*, the other trustee, his executors. The debt of *Mary Dyer* was paid in November, 1815; the legatees were all paid the amount of their legacies previously to June, 1831.

About twelve o'clock at noon, on the 25th March, 1830, the plaintiff, with his daughter, the wife of *John Blackmore*, went to the dwelling-house in the declaration mentioned, in order to take possession of the same; no person was then residing in the house, and the door was locked. The defendant, accompanied by *George Braddick*, who attended by the directions of his father, *W. Braddick*, the surviving trustee under *James Troake*'s will, the parish constable and others came also to the dwelling-house at the same time; shortly afterwards *James Pring*, the representative of the original lessee, *Thomas Pring*, and who was the person in possession of the premises, under the lease for twenty-one years, from the 25th March, 1809, came with his wife to the door of the dwelling-house, saying he thought it was nearly twelve o'clock and time to give up possession of the premises; his wife then gave him two keys, which he handed to the defendant and *G. Braddick*, and having described which belonged to the outer door and which to the cellar, he and his wife went away. The defendant and *G. Brad-*

dick then unlocked the door; the plaintiff and his party immediately attempted to enter the house, but the defendant and *G. Braddick* ordered the constable to keep the plaintiff and those with him from entering the house, which they did by pushing the plaintiff and his party back forcibly. On the defendant and *G. Braddick* entering they put *Toler* into possession, saying they had let the farm to him at 35*l.* per annum, but that if when the decree came down, alluding to a suit in the Court of Exchequer, instituted by the plaintiff against the trustees, to recover possession of the property, it was given in the plaintiff's favour, they would give up possession. Upon the above state of facts I do find and award as follows:—"First, I do find the issue joined on the 1st plea, so far as the said plea applies to the 1st count of the declaration in the said case, for the plaintiff; and so far as the said plea applies to the 2d and 3d counts of the said declaration, for the defendant. Secondly, I do find the issue joined on the 2d plea for the defendant. Thirdly, I do find the issue joined on the replication, so far as the same applies to the 3d plea, for the plaintiff. Fourthly, I do find the issue joined in the said replication, so far as the same applies to the 4th plea, for the defendant. Fifthly, I do find the issue joined on the replication, so far as the same apply to the 5th and 6th pleas, for the plaintiff; and I do direct that, if the Court should be of opinion that the issue joined on the second plea should, upon the facts stated, have been found for the plaintiff instead of the defendant, and that the issue joined on the replication, so far as the same applies to the said 3d plea, is rightly found for the plaintiff, then I do further find that the damages on such issue are 35*l.*; and I do further direct that, if the Court shall be of opinion that any of the above issues are wrongly found, that then such issue shall be entered, not as found above, but according to the direction of the Court."

Crowder having obtained a rule nisi to enter a verdict for the plaintiff on the 2d and 4th issues,

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Erle and *Bere* shewed cause, in Michaelmas term last (*a*). The arbitrator has found that the plaintiff was not possessed on the 25th March, 1830, and that *Pring* was the tenant in possession on that day. In order to entitle the plaintiff to a verdict on these issues, it must be contended that the giving up the key by *Pring* to the defendant on that day was a forfeiture of his term, on the authority of *Doe* v. *Flynn* (*b*). But there the tenant gave up possession of the premises in collusion with a party setting up a hostile title to his landlord. Here, the arbitrator has not found that there was any fraud, and for a series of years *Pring* had paid his rent to the defendant, within the knowledge of the plaintiff. Suppose this had been a beneficial lease, and there had been a dispute as to the landlord's title between the heir and the executor, the giving up possession to one or the other clearly would not be a forfeiture; *Doe* v. *Pasquali* (*c*). It is quite clear that the mere giving up possession of the premises does not operate as a surrender of the lease, for a surrender can only be by writing or by operation of law; and even the consent of the landlord to the tenant's quitting does not operate as a surrender in law, *Mollett* v. *Brayne* (*d*), any more than the cancelling of a lease, as is shewn by a number of authorities collected in *Roe* v. *Archbishop of York* (*e*); nor does the abandonment of the premises by *Pring* make any difference, for even if he had gone away altogether, and had merely made an entry upon them on the 25th March, he might have maintained trespass against the plaintiff, *Butcher* v. *Butcher* (*f*). But it will be contended that, as this lease was to commence *from* the 25th of March then next, that day must be reckoned inclusive, and that the term therefore expired on the 24th March. In *Pugh* v. *The Duke of Leeds* (*g*), Lord *Mansfield* C. J.

(*a*) Nov. 8th, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

(*b*) 1 C. M. & R. 137.

(*c*) Peake, N. P. C. 196.

(*d*) 2 Campb. 103.

(*e*) 6 East, 86.

(*f*) 7 B. & C. 399; *S. C.* 1 Mann. & R. 220.

(*g*) Cowp. 714.

reviewed the numerous decisions upon this point, and he laid down that the word *from* in leases and deeds was to be construed exclusive or inclusive of the day, according to the subject-matter and the intention of the parties. Now as rent is made payable under this lease on the 25th of March, unless the word "from" be reckoned exclusive, the rent would be made payable after the demise, which could not have been the intention of the parties.

Crowder and *Kinglake*, contrà. The arbitrator has not found the point expressly as to the determination of the lease, but it is clear from the authorities that the term expired on the 24th March. *Pugh* v. *The Duke of Leeds* (*a*) is not in point, for the decision there was that the word "from" was to be reckoned inclusive, in order to effectuate the intention of the parties by bringing a lease within a power; but here no light can be gathered from the parties' intention, and it clearly was a matter of indifference to them, whether the day was inclusive or exclusive. It would seem, as the term was to commence from a future day, that it was to begin with the beginning of that day. *Hatter* v. *Ash* (*b*), on the other hand, is an express authority for the plaintiff, for there it was held that a lease habendum a datu indenturæ included the day of the date of the lease. If an act is to be done on the day from which the time is to run, then the day is excluded; if no act is to be done, the day is included. This distinction will probably reconcile all the cases which are commented on in *Pugh* v. *The Duke of Leeds* (*a*). No act was to be done in this case. The term therefore expired on the 24th March, and the plaintiff was justified in taking peaceable possession on the 25th, although the tenant had not delivered up possession; *Taunton* v. *Costar* (*c*), *Turner* v. *Meymott* (*d*). But if the first day be excluded, still the giving up possession on any part of the 25th March, was sufficient to vest possession in the plaintiff,

(*a*) Cowp. 714.
(*b*) 1 Lord Raym. 84.
(*c*) 7 T. R. 431.
(*d*) 1 Bing. 158.

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for the law recognizes no fraction of a day, per *Holt* C. J. in *Fitzhugh* v. *Dennington* (*a*), and he may be considered to have delivered up possession at twelve o'clock at night. [*Coleridge* J. In that case the second issue must be found against you.] No, for, although as the law does not take notice of the fraction of the day, it may be intended that *Pring* gave up possession at twelve o'clock at night, yet, as the fraction of a day will be noticed where the interests of third parties are at stake, *Thomas* v. *Desanges* (*b*), it may be presumed, by *Pring*'s delivering up possession at twelve o'clock in the day, that he entered at that hour, and that his term was finished; *Lester* v. *Garland* (*c*).

With regard to the acts of *Pring* amounting to a surrender, in *Grimman* v. *Legge* (*d*) it was held that the delivery by the tenant of the key of premises to the landlord, and the acceptance by him during a current quarter, put an end to the contract between them. *Whitehead* v. *Clifford* (*e*) is to the same effect. *Pring* in this case either gave up possession to his landlord, or to some one claiming hostilely to the latter; in the former supposition there is an end of the contract; in the latter, it is a forfeiture of the term; *Doe* v. *Flynn* (*f*).

Cur. adv. vult.

Erle had also obtained a rule nisi to enter a verdict for the defendant on the third, fifth and sixth issues.

Crowder and *Kinglake* shewed cause. The arbitrator has found in effect that the trustees did not take a fee under the will of *Troake*, and, it is submitted, rightly. The devise is to them (without adding words of inheritance) upon trust that they should set and let the premises, and out of the rents and profits pay off certain debts and legacies, and

(*a*) 2 Lord Raym. 1094.
(*b*) 2 B. & Ald. 586.
(*c*) 12 Ves. 248.
(*d*) 8 B. & C. 324; *S. C.* 2 Mann. & R. 438.
(*e*) 5 Taunt. 518.
(*f*) 1 C. M. & R. 137.

after the debts and legacies were paid off, a devise over. The debts and legacies having been all paid off, the estate vested in the devisee, without any conveyance from the trustees, for they took a chattel interest only, or at most a determinable fee. The rule is well established that, whatever the terms of a devise may be, trustees take only so much estate as is necessary to satisfy the trusts: *Doe* v. *Simpson* (*a*). In that case the amplest powers of leasing were given to the trustees (which is the circumstance relied upon in the present devise), but the Court held that this did not raise a necessary inference that the testator meant to give his trustees an estate in fee. In *Doe* v. *Nicholls* (*b*) *Bayley* J. adopted the above rule, and said, "It may be laid down as a general rule that, where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore as soon as the trusts are satisfied, it will vest in the persons beneficially entitled to it;" and he cites for the position *Doe* v. *Simpson* (*a*) and *Doe* v. *Timins* (*c*). The cases of *Carter* v. *Barnardiston* (*d*), *Lord Say & Sele* v. *Jones* (*e*), *Shapland* v. *Smith* (*f*), and *Silvester* v. *Wilson* (*g*), *Warter* v. *Hutchinson* (*h*) and *Nash* v. *Coates* (*i*) establish the same principle. The question therefore is, whether a less estate than a fee would not be sufficient for all the purposes of this trust. It clearly would, for although the power to grant a term might be necessary, that would be only a term of a short duration, and therefore might be well carved out of the chattel interest of the trustees, or it might be in virtue of a power and not of any estate in the trustees. A chattel interest therefore would be sufficient, or, at all events, a determinable fee, in which case the devisee would take under the will

(*a*) 5 East, 162.
(*b*) 1 B. & C. 336; *S. C.* 2 D. & R. 480.
(*c*) 1 B. & Ald. 530.
(*d*) 1 P. Wms. 509.
(*e*) 3 Bro. P. C. 113.
(*f*) 1 Bro. Ch. C. 75.
(*g*) 2 T. R. 444.
(*h*) 1 B. & C. 721; *S. C.* 3 D. & R. 58.
(*i*) 3 B. & Ad. 839.

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as an executory devise when the legacies were paid: *Wellington* v. *Wellington*(*a*), *Doe* v. *Martyn*(*b*). The cases relied upon by the other side are *Doe* v. *Willan*(*c*) and *Doe* v. *Walbank*(*d*), where the trustees had an unlimited power of leasing given them, and it was held that they took the fee. But in both those cases the devise was to the trustees and to their heirs, which, primâ facie, carried the inheritance, and there was nothing on the face of the will to shew an intention to give them a less estate. Besides, it did not appear that any less estate would have satisfied the purposes of the trust. In *Doe* v. *Willan*(*c*) *Abbott* J. expressly said, "Not being able clearly to see what less estate than the fee the trustees took, or even what less estate would satisfy all the objects of this will, I feel myself bound to give effect to the testator's first words, which are free from all ambiguity, and by which the trustees took a fee." Again; in *Doe* v. *Edlin*(*e*) the Court held that the trustee took a fee; but there he was directed to *convey* the estate on the happening of a certain event, and, as he might have to convey in fee, it was necessary for him to have the estate previously vested in him. *Doe* v. *Field*(*f*) and *Doe* v. *Williams*(*g*) were decided on the same principle.

Erle and *Bere*, contrà. I. The trustees took an estate in fee, and not a chattel interest. It may be admitted that the decisions as to what estate trustees take under devises like the present are contradictory; but the late decisions shew that, where the purposes of the trust *may* require the fee, there a fee passes, although events shew that a less estate than a fee would have been sufficient. In *Jones* v. *Morgan*(*h*), where the devise was to trustees to raise money to pay the testator's debts, and, after payment of them, to stand seised to the use of *E.*, with remainders over, it was

(*a*) Cited in Fearne, C. R. 450, n., 9th ed.
(*b*) 8 B. & C. 497; *S. C.* 2 Mann. & R. 485.
(*c*) 2 B. & Ald. 84.
(*d*) 2 B. & Ad. 554.
(*e*) 4 A. & E. 582.
(*f*) 2 B. & Ad. 564.
(*g*) 2 M. & W. 749.
(*h*) 1 Bro. Ch. C. 206.

held that the fee passed, for that they might have to sell the estate, which they could not without having the fee. *Wright* v. *Pearson* (*a*) and *Gibson* v. *Lord Montford* (*b*) are to the same effect. And it is not necessary that the devise should be to the trustees and *their heirs* in order to give the fee: if the purposes of the trust require an estate in fee, the Court will imply it; *Doe* v. *Woodhouse* (*c*); and the quantity of estate devised depends upon the intention of the testator; *Com. Dig.* Devise (N 4). *Lord Saye & Sele* v. *Lady Jones* (*d*) has been remarked upon as a solitary case, standing on its own grounds (*e*). With regard to *Doe* v. *Simpson* (*f*), the Court came to a most complicated construction, and decided upon all the minute facts of the case. Neither of these cases therefore can be relied upon as authorities. In *Shapland* v. *Smith* (*g*) the decision did not turn on the point now before the Court, but the question was, whether the estate was not instantly executed in *Shapland*. Then *Doe* v. *Willan* (*h*) and *Doe* v. *Walbank* (*i*) are quite in point with the present case. The power of leasing is given here, as in those cases; and Lord *Tenterden* C. J. decided in *Doe* v. *Walbank* (*i*) that it was necessary a fee should be given to exercise that power. Besides, as the testator had granted a lease for twenty-one years, it is clear the trustees' power to lease could not commence till the expiration of that term. The Court cannot tell, on reading this devise, what the rents and profits would amount to: it might even be necessary to sell the estate to satisfy the charges, and the question does not arise ex post facto. As *Holroyd* J. remarked in *Doe* v. *Willan* (*h*), "it cannot depend upon subsequent events whether they are to take an estate in fee or not, because they must take that estate in the first instance, on the death of the testator."

(*a*) 1 Eden, Ch. C. 119.
(*b*) 1 Ves. sen. 485.
(*c*) 4 T. R. 89.
(*d*) 3 Bro. Ch. C. 458.
(*e*) Per *Lawrence* J., 5 East, 167.
(*f*) 5 East, 162.
(*g*) 1 Bro. Ch. C. 75.
(*h*) 2 B. & Ald. 84.
(*i*) 2 B. & Ad. 554.

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II. It is contended that the trustees took a fee determinable on the debts and legacies being satisfied; but this construction would defeat the intention of the testator, for it would prevent the devise to *Blackmore* taking effect. No principle is more clear than that an executory devise cannot take effect after a life or lives in being and twenty-one years; but as it is uncertain when the debts and legacies would be satisfied, *Bagshaw* v. *Spencer* (*a*), this period might be exceeded, and therefore the contingency is too remote. [*Crowder* also cited *Doe* v. *Ewart* (*b*).]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the facts, his lordship proceeded:—

The greater question in this case arose on the defendant's pleas that he was possessed and that *Toler* was possessed, which the arbitrator found against him, thereby affirming the plaintiff's title as a purchaser from *J. Blackmore*, and denying that of the trustees.

We think the award clearly right in this respect. The case most relied on for the opposite doctrine is *Doe* v. *Willan* (*c*), (recognized by some more recent decisions,) in which the circumstance of the trustees having power to lease at their discretion was relied on by the Court, as shewing the testator's intention to vest an absolute fee in them. Here it is true they have power to set and let—a power which (it was ingeniously observed), as *Pring*'s lease would not expire till 1830, could not be acted upon till after that period. But it is not found by the award that *Pring*'s lease was in existence when the will was made; and if it were, not only is the whole power of the trustees limited to the purpose of paying the specified debt and legacies, but the estate is expressly given over when they are paid. Now that event happened in 1821. It may

(*a*) 1 Ves. sen. 142.
(*b*) 3 N. & P. 197.
(*c*) 2 B. & Ald. 84.

be added that there might have been a necessity for creating a term for payment of the debts and legacies, for which purpose the power might have been given.

We are next to consider whether the arbitrator was right in finding that the plaintiff was not possessed, and that *Pring*, the lessee, was possessed. The acts done by *Pring* are equivocal, and they do not necessarily import either a surrender or forfeiture of the term. But the plaintiff, who was entitled to the reversion, actually entered, and that entry was good if the term had then expired, i. e. at twelve o'clock in the daytime on the 25th day of March, 1830. Four cases were quoted to shew that it had expired with the preceding day; *Hatter* v. *Ash* (*a*), *Fitzburgh* v. *Dennington* (*b*), *Thomas* v. *Desanges* (*c*), *Grimman* v. *Legge* (*d*). Of these cases the first named alone applies in any degree to the point; and that is disposed of by Lord *Mansfield*'s observations, in his admirable judgment in *Pugh* v. *The Duke of Leeds* (*e*), to the principle of which we fully adhere. The general understanding is, that terms for years last during the whole anniversary of the day from which they are granted. Indeed if this were otherwise, the last day on which rent is almost uniformly made payable would be posterior to the lease.

We think therefore that both rules must be discharged.

Rules discharged.

(*a*) 1 Ld. Raym. 84.
(*b*) 2 Ld. Raym. 1094.
(*c*) 2 B. & Ald. 586.
(*d*) 8 B. & C. 324; *S. C.* 2 Mann. & R. 438.
(*e*) Cowp. 714.

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Wednesday, February 6th.

Vendor by a delivery order directed the defendants, who were wharfingers, to deliver to the vendee 1028 bushels of oats, bin 40, to be weighed over, and the expense of weighing to be charged to the vendor. The vendee afterwards gave an order to the same effect on a sale to the plaintiffs. There were no other oats in the bin, and they were transferred to the plaintiffs in the defendants' books, but never weighed over. The vendor, on the failure of the first vendee, claimed a right of stoppage in transitu:—Held, without reference to any estoppel against the defendants, the wharfingers, that the property had passed as between buyer and seller, so as to defeat the vendor's right of stoppage.

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TROVER for oats. Pleas: 1. not guilty; 2. that the oats were not the property of the plaintiffs.

At the trial before *Patteson* J., at the Liverpool spring assizes, 1837, the question turned upon the construction of two delivery orders. By the first, dated the 3d October, 1836, Messrs. *Turner* & Co. directed the defendants (who were wharfingers) to deliver to a Mr. *John Marsden* 1028 $\frac{1}{4}\frac{1}{5}$ bushels of oats, bin 40, and "you will please weigh them over and charge us the expense." By the second, dated the 3d October, 1836, *Marsden* directed the defendants to deliver to plaintiffs 1028 bushels of oats in bin 40, and "let them be weighed over, and send a note up, and I will see it paid." The said oats were all that were in bin 40. They were transferred to the plaintiffs in the defendants' books, who said that all was right, but were never weighed over. The plaintiffs had accepted a bill for the price, which they duly honoured. *Marsden* became a bankrupt, and on his failure Messrs. *Turner* sought to stop the oats. The only question was, whether the weighing over was necessary, in order to vest the property in the plaintiffs. Neither of the contracts of sale was given in evidence. The jury, under the direction of the learned judge, found a verdict for the plaintiffs; and leave was given to the defendants to move to enter a nonsuit.

Wightman having obtained a rule accordingly, in the ensuing Easter term,

Cresswell and *Tomlinson* now shewed cause (*a*), and contended that, even if the delivery was incomplete, as between vendor and vendee, the defendants, at all events, who had attorned to the plaintiffs, were estopped from denying their title, and cited *Harman* v. *Anderson* (*b*), *Stonard* v. *Dunkin* (*c*), *Barton* v. *Boddington* (*d*), *Gosling* v. *Birnie* (*e*),

(*a*) Before Lord *Denman* C. J., *Littledale*, *Patteson* & *Williams* Js.
(*b*) 2 Campb. 248.
(*c*) 2 Campb. 344.
(*d*) 1 C. & P. 207.
(*e*) 7 Bing. 339.

Hawes v. *Watson* (*a*), *Dixon* v. *Hamond* (*b*), *Whitehouse* v. *Frost* (*c*), *Lucas* v. *Dorrien* (*d*), and *Holl* v. *Griffin* (*e*).

Wightman, contrà. More remained to be done here, in order to complete the delivery of the goods, than in the cases cited. The defendants are merely nominal parties; the real parties are *Turner* on the one hand and the plaintiffs on the other. Would either *Marsden* or the plaintiffs have been obliged to take the oats if they were not of the quantity described? Weighing was necessary to ascertain their quantity and price. *Turner* could not have sued *Marsden* for the price, nor he the defendants, until the oats had been weighed. The contract was not to buy all the oats in a certain bin, but so many bushels. In *Hanson* v. *Meyer* (*f*), the vendor gave a note to the vendee, addressed to the warehousekeeper, directing him to weigh and deliver to the vendee all his starch; and it was held that the absolute property in the starch did not vest in the vendee before the weighing, which was to precede the delivery, and necessary to ascertain the price. So in *Busk* v. *Davis* (*g*), where plaintiffs sold 10 out of 18 tons of flax, lying at the wharf of the defendants, at a certain sum per ton, and an order was given to deliver the 10 tons to the vendee, which the defendants entered in their books, but the quantity was to be ascertained by weighing; it was held that the sale was not complete, as the flax was to be weighed, and a portion of the entire bulk to be ascertained. *Withers* v. *Lyss* (*h*) is an authority to the same effect. [*Patteson* J. *Shepley* v. *Davis* (*i*) also, is a similar case; in that case, and in *Hanson* v. *Meyer* (*f*), fourteen days were allowed for weighing. In what time do you say the weighing, in this case, should have been completed—a reasonable time?] Perhaps so,

(*a*) 2 B. & C. 540; *S. C.* 4 D. & R. 22.
(*b*) 2 B. & Ald. 310.
(*c*) 12 East, 614.
(*d*) 7 Taunt. 278.
(*e*) 10 Bing. 246; *S. C.* 3 M. & Scott, 732.
(*f*) 6 East, 614.
(*g*) 2 M. & S. 397.
(*h*) 4 Campb. 237.
(*i*) 5 Taunt. 616.

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either party might have weighed. [Lord *Denman* C. J. I do not understand it to be contended for the plaintiffs that *Hanson* v. *Meyer* (*a*) is overruled, but that it does not apply where the warehouseman is defendant.]

Cur. adv. vult.

Lord DENMAN C. J., on this day, said that the rule for entering a nonsuit must be discharged; but that the paper containing the reasons for the judgment had been mislaid.

The reporters have since been favoured with the written judgment, which, after stating the facts of the case as above, proceeded as follows:—

The cases on the subject establish the principle that, wherever anything remains to be done by the seller, which is essential to the completion of the contract, a symbolical delivery by transfer in the wharfinger's books will not defeat the right of stoppage in transitu, as between buyer and seller. *Hanson* v. *Meyer* (*a*), *Shepley* v. *Davis* (*b*), and *Busk* v. *Davis* (*c*), abundantly shew this. Therefore, if part of a bulk be sold, so that weighing or separation is necessary to determine the identity or individuality (as Lord *Ellenborough* expresses it in *Busk* v. *Davis* (*c*)) of the article, or if the whole of a commodity be sold, but weighing is necessary to ascertain the price, because the quantity is unknown, the weighing or measuring must precede the delivery, and the symbolical delivery without such weighing will not be sufficient. But when the identity of the goods and the quantity are known, the weighing can only be for the satisfaction of the buyer, as was held in *Harman* v. *Anderson* (*d*) and *Hammond* v. *Anderson* (*e*), and in such case the transfer in the books of the wharfinger is sufficient. We are of opinion that the present case is of the latter description, and that this property passed as between buyer and seller. We have therefore no occasion to resort to the

(*a*) 6 East, 614.
(*b*) 5 Taunt. 616.
(*c*) 2 M. & S. 397.
(*d*) 2 Campb. 243.
(*e*) 1 New Rep. 69.

doctrine of estoppel, which is strongly enforced in *Hawes* v. *Watson* (*a*), but we do not mean, in so saying, to cast any doubt upon the authority of that case.

Rule discharged.

(*a*) 2 B. & C. 540; *S. C.* 4 D. & R. 22.

JOHNSON *v.* JONES and another.

Friday, February 1st.

REPLEVIN for taking the plaintiff's goods from his house. Avowry and cognizance for 14*l.*, balance of 40*l.*, being a year's rent, due the 25th March, 1834, for the said house, held by plaintiff as tenant to defendant, *Jones*.

Plea in bar; that before the defendant *Jones* had any estate or interest in the premises, to wit, on the 13th of November, 1801, *Anne Griffith* was seised in fee of the reversion of the premises expectant on the determination of a term of ninety years from the 29th September, 1769, belonging to her for life, remainder to her son; and she being so seised, by lease and release conveyed her reversion to one *Clements*, in fee, and with her son assigned the whole of the term to him in mortgage, to secure the repayment of a sum of 210*l.*, with a proviso that they should keep possession until default was made in the payment of the said sum. It was then alleged that default was made in payment, and that the said sum still remained due, whereby, before the defendant *Jones* had any interest in the said premises, *Clements* became seised in fee of the premises, subject to the power of redemption; that *A. Griffiths* died intestate on the 1st November, 1805, whereupon her equity of redemp-

To an avowry of a distress for rent the plaintiff pleaded that, before defendant had any interest in the premises, they were mortgaged in fee; that the mortgagor remained in possession, and demised to the defendant; that the defendant, the mortgage money being still due, demised to the plaintiff; that afterwards, the mortgage money being still due, and interest thereon, and 14*l.*, avowed for by the defendant, being also in arrear, the mortgagee gave notice to the plaintiff to pay the 14*l.* to him instead of to the defendant, and threatened, in case of non-payment, to put the law in force, and was then about to put the law in force, wherefore the plaintiff necessarily paid that sum to the mortgagee, and so the said sum was not in arrear; concluding with a verification:—Held, on special demurrer, that the plea was good, being a plea of payment, and not of nil habuit in tenementis; that it was not bad for setting out the circumstances of the payment, or for concluding with a verification.

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tion descended upon her son, who entered into the premises, and died intestate on the 12th September, 1812, whereupon his equity of redemption descended upon his brother, *David Griffiths*, who also entered, and on the 1st November, 1817, demised the premises to the defendant, *Jones*, for twenty-one years; that on the 1st June, 1820, *Clements*, the mortgagee, died, seised in fee, intestate, and his estate descended upon his brother, *Benjamin Clements*, who entered, and is still seised in fee of the said premises; that on the 25th March, 1833, the mortgage money being still due, and the defendant having no estate or interest whatsoever, except under the demise, demised the said premises to the plaintiff, who, by virtue of the said demise, entered and became possessed of the said premises, and continued possessed thereof until the time when &c., and that *B. Clements*, being so seised in fee of the premises, and the sum of 210*l.*, with a large arrear of interest, being due, and the said sum of 14*l.* of the rent in the avowry mentioned being also due and owing, in arrear and unpaid, by the plaintiff, as such tenant as aforesaid, under the demise made to him by the defendant *Jones* as aforesaid, afterwards, while the said mortgage money and interest was due, and whilst the said sum of 14*l.* of the rent aforesaid, in the avowry mentioned, was due and in arrear from the plaintiff to the defendant *Jones*, and before the said time when &c., gave notice of the premises to the plaintiff, and required him to pay the said sum of 14*l.* to him as such mortgagee, instead of to the defendant *Jones*, and demanded payment of the same from the plaintiff, so being such tenant of the premises under such demise as aforesaid, and threatened, in case of the non-payment of the same to him forthwith, to put the law in force, and was then about to put the law in force for the recovery of the said arrear of rent, and to compel the payment of the same to him; wherefore the plaintiff necessarily and unavoidably paid to the said *B. Clements* the sum of 14*l.*; and so the plaintiff saith, that no part of the said sum of 14*l.* was or is in arrear as alleged, of all which said premises the de-

fendants afterwards, and before the time when &c., had notice. Verification.

Special demurrer, assigning several causes of demurrer; among others, that the plea ought to have concluded to the country, and that it amounted to a plea of nil habuit in tenementis.

W. H. Watson, in support of the demurrer. The question is, whether the tenant can be permitted to say that his landlord never had any title, and that his rent has been paid to a third person, who had title. *Alchorne* v. *Gomme* (*a*) shews that this plea is bad. In that case the plea to an avowry of distress for rent in arrear, stated that the defendant, who demised the premises to the plaintiff, was only mortgagor; that the mortgagee claimed the rent, and that plaintiff paid it to him. This is nothing more than a plea of nil habuit in tenementis, as in that case, although there the plea was not so obviously bad as the present, for it went on to say that the mortgagee required the lessee to attorn, and that the lessee did attorn, and that he afterwards distrained for rent, when the lessee paid him. But the rule is, that nothing short of eviction will excuse the non-payment of rent, and to constitute eviction, there must be a divesting of the tenancy and an expulsion of the tenant. Here the plea merely alleges that the mortgagee demanded the rent, and threatened to distrain. The plaintiff, by stating that defendant had nothing more than a lease from a mortgagor, denies his title, for the mortgagor can legally create no interest except by estoppel; and a court of law cannot notice that he has any title, without embracing the subject of trusts in its jurisdiction. *Pope* v. *Biggs* (*b*) was an action of debt for use and occupation; the defendant pleaded nil debet, and was allowed to discharge himself of his rent by proving that his lessor had mortgaged the premises, and that he (the tenant) had paid rent to the mortgagee, who had required

(*a*) 2 Bing. 54. (*b*) 9 B. & C. 245; *S. C.* 4 Mann. & R. 193.

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him to do so. In *Sapsford* v. *Fletcher* (*a*) the tenant was allowed to plead that before his rent became due he paid it, in order to save his goods from distress, to the ground-landlord of his lessor. So in *Taylor* v. *Zamira* (*b*), to an avowry for rent, the plaintiff in replevin was allowed to plead that, previously to the demise, an annuity had been granted of the lands demised; that the grantee of the annuity threatened to distrain for arrears, and that the plaintiff thereupon paid him. But in those two cases the tenant admitted that his landlord had a communicable interest in the premises, and alleged that there was a charge upon them, which it was necessary to pay. But here the tenant denies that his landlord had any thing more than a term granted by a mortgagor, who of course had no legal title to grant the term, nor could the mortgagee have affirmed it; for in *Evans* v. *Elliott* (*c*) it was held that the mortgagee could not adopt a lease made by the mortgagor after the mortgage. This plea therefore denies that the defendant ever had any title.

If, however, this plea be good as a special plea of riens en arriere, it should have concluded to the country.

Butt, contrà. *Alchorne* v. *Gomme* (*d*) is no authority against the plaintiff; for there the plea not only stated a mortgage in fee of the demised premises, before the demise to the plaintiff, but repudiated altogether the landlord's title, by adding that he claimed title to the premises *under colour of a pretended agreement* of sale with the mortgagor. The other three cases cited are distinct authorities for the plaintiff. This is a plea of payment therefore; and the plea cannot be bad because it shews the reasons for making the payment, and that it was virtually made by the authority of the landlord.

Lord DENMAN C. J.—This appears to me a very clear

(*a*) 4 T. R. 511.
(*b*) 6 Taunt. 524.
(*c*) *Ante*, 256.
(*d*) 2 Bing. 54.

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case. This is not a plea of nil habuit in tenementis, but of payment. It was certainly necessary for the plaintiff's purpose to shew a defect of title in the lessor; but the plaintiff does not set up that by way of avoiding the lease, but merely to shew that it brought upon him the necessity of paying the interest on the mortgage, through the lessor's default, and that such payment was for the lessor's benefit. This plea does not appear to me to differ substantially from the pleas in *Sapsford* v. *Fletcher* (*a*) and *Taylor* v. *Zamira* (*b*), where payments made in exoneration of charges on the demised premises were allowed to be pleaded in satisfaction of rent. If so, the only question is, whether the plea is well pleaded. I do not know why the plaintiff should be confined to a simple statement of the fact of payment; it is for the benefit of the defendants that the particular circumstances under which the payment was made should be set out, so that the opinion of the Court might be taken on their sufficiency. The plea is good; it is supported by several cases, and opposed to none.

LITTLEDALE J.—Where a lessor avows for a distress for rent, a plea that another person had a prior title to his, without an averment of eviction, is not good. But this is not a plea of nil habuit in tenementis; it shews only that before the lease another person had an interest in the demised premises, by way of charge upon them; but non constat, therefore, that the lessor had not power to make the lease. The plea merely states that the lease was made, subject to such charge; that 14*l.* was due, for rent, to the defendant; and that the plaintiff, upon notice from the mortgagee, paid that sum to him, not as rent, but in satisfaction of the interest due to him upon his mortgage. Both *Sapsford* v. *Fletcher* (*a*) and *Taylor* v. *Zamira* (*b*) are authorities for the plaintiff. In those cases the lessor had not an entire interest, but held subject to certain charges; it can make no

(*a*) 4 T. R. 511. (*b*) 6 Taunt. 524.

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difference whether the charges are by way of mortgage, annuity, or any thing else. It is then objected that, if this is a plea of payment, it should have been pleaded simply as such, otherwise that it is a plea of riens en arriere. But no prejudice can arise from stating the grounds of the payment. In both the above cases the circumstances attending the payment were detailed to shew that it was not voluntary. The plea is good, both on the merits and in form.

WILLIAMS J.—I am of the same opinion. This is not a plea of nil habuit in tenementis. The lessor's title is not denied, but facts are alleged which shew that the payment was authorized by law. The present is not distinguishable from the two cases cited for the plaintiff; in both of them the grounds of the payment were shewn to be in satisfaction, of an annuity in one case, and of ground rent in another. It is said that the allegation of the necessity of the payment is not sufficiently strong; but it is just as strong as in *Taylor* v. *Zamira* (*a*).

COLERIDGE J.—I am of opinion that this plea may be supported without interfering either with principle or decided cases. If this amounted to a plea of nil habuit in tenementis, it would, no doubt, be bad for not alleging an eviction. That is the only effect of *Alchorne* v. *Gomme* (*b*). This plea does not state either that the lessor had no authority to demise, or that no rent was due; on the contrary, it admits that the lease was good as between party and party, and that 14*l.* was in *arrear to Jones*, and then avers that the mortgagee gave notice that that sum should be paid to him instead of to *Jones*, and that the plaintiff did so pay it. There can be no objection to his shewing in what manner he paid it. The two cases referred to are completely in point.

Judgment for the plaintiff (*c*).

(*a*) 6 Taunt. 524.
(*b*) 2 Bing. 54.
(*c*) See *Doe* v. *Boulter*, 1 N. & P. 650.

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To trover for two reclaimed deer, the defendant pleaded, 1, except as to one, actionem non, because he is not guilty; and 2, as to that one, that he took it damage feasant in his own close, as a distress, which was the conversion complained of:—Held, on special demurrer to the latter plea, that it need not have commenced with actionem non:—Held also (*Littledale* J. dubitante) that the plea confessed and avoided a conversion; that it was nor necessary for the defendant to add, that he had impounded the deer, or in what manner he had disposed of it, and that if there was any irregularity in disposing of the distress it should have been new assigned.

TROVER for two reclaimed deer. Plea: 1. As to one of the said deer, the general issue.

And the defendant, as to the said conversion of one of the said reclaimed deer in the declaration mentioned, and in the first plea excepted, says, that he the said defendant, before and at the said time when &c., was possessed of a certain close, situate and being at Kettleburgh, in the county of Suffolk aforesaid, and because the last-mentioned deer, before and at the said time when &c., was wrongfully in the said close of the defendant, doing damage there to the said defendant; he, the said defendant, at the said time when &c., seized and took the last-mentioned deer in the said close of the defendant so doing damage therein as aforesaid, as a distress for the said damage so there done and doing by the said deer as aforesaid; which said seizing and taking is the same conversion whereof the plaintiff hath above complained, and this the defendant is ready to verify.

And as to the plea of the defendant, by him lastly above pleaded, the plaintiff says that the same is not sufficient in law, and he states and shews to the Court here the following causes of demurrer to the said last plea; that is to say, that the said last plea amounts to the general issue, and is an argumentative denial of that which is the gist of the action (namely, the wrongful conversion of the deer in the last plea mentioned) by affirming that the conversion complained of by the plaintiff was a seizing and taking, which the defendant in his said last plea attempts to justify, thereby in effect averring that the conversion complained of was a lawful taking, and not a conversion. And also for that the said last plea is argumentative, and so an indirect and argumentative denial of the plaintiff's being possessed of the said deer, as of his own property, and disputes by inference, and in an argumentative and indirect manner, the

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plaintiff's right to the possession of the deer, at the time of the commencement of the action. And also, for that the said last plea neither traverses nor confesses and avoids the conversion of the said deer in the said last plea mentioned. And also for that the said defendant hath not, in or by his said last plea, stated or shewn in what manner the distress in that plea mentioned was disposed of, or what was done therewith, but merely claims a right to seize and take the said deer as a distress damage feasant, without proceeding therewith. And also for that the said last plea, though it is pleaded only to part of the causes of action in the declaration mentioned, that is to say, as to one only of the said deer mentioned therein, yet the said plea does not contain any allegation of actionem non, nor does it conclude with any prayer of judgment; and also for that the said last plea is in other respects informal and insufficient.

Gunning, in support of the demurrer. The plea, not being in bar of the whole action, should have commenced with actionem non, according to rule 9 of H. T. 4 *W.* 4.

Byles, contrà, (having been called upon to answer this objection). The phrase "*whole* action" in the rule, is to be understood with reference to all the steps of the action, and not to the extent of the complaint or demand. "It is to be understood as applying to a plea pleaded in bar of the whole action, as contradistinguished from a plea in bar of further maintenance of the action;" per *Parke* B., in *Putney* v. *Swann* (*a*). He also referred to *Philips* v. *Roderick* (*b*), recently decided in the Court of Exchequer.

Gunning. In *Putney* v. *Swann* (*a*) the defendant's plea was taken as an answer to the whole demand, but was an insufficient answer, but here the defendant professes, on the face of this plea, to answer part only of the complaint in the declaration. In *Bird* v. *Higginson* (*c*), this Court

(*a*) 2 M. & W. 72. (*b*) Not yet reported. (*c*) 1 Har. & Wol. 61.

construed the rule differently from the Court of Exchequer, and held that the expression "whole action generally" in the new rules meant the whole case contained in any one count. Secondly, the plea is bad as an argumentative denial of the conversion, and therefore amounting to the general issue. No conversion is admitted where the detainer of goods is shewn to be lawful; *Hartford* v. *Jones* (*a*). The new rules will not help the defendant, for *Scarfe* v. *Morgan* (*b*), and *Owen* v. *Knight* (*c*), shew that this is an argumentative traverse of the plaintiff's possession. In *Samuel* v. *Duke* (*d*) there are dicta against this position, but no decision.

Another ground of demurrer is, that the plea does not shew what was done with the deer after the taking. The distrainor had no right to take except for the purpose of impounding: it is consistent with this plea that the distrainor killed the animal instead of impounding it.

Byles, contrà. By the new rules, whenever there has been a conversion in fact, which the defendant wishes to justify, he must plead specially the matter of justification; *Stancliffe* v. *Hardwick* (*e*), and *Samuel* v. *Duke* (*d*). Then the plea proceeds to justify all that was necessary. It first admits a conversion, for the taking was a conversion (*f*), *Baldwin* v. *Cole* (*g*), *M'Combie* v. *Davies* (*h*), and then justifies the conversion so admitted. It was not necessary for the defendant to allege that he impounded the deer, he might, after taking it, have let it go again, or have driven it off his close. If there was any further conversion the plaintiff should have new assigned.

Gunning replied.

(*a*) 2 Salk. 654, pl. 2.
(*b*) 4 M. & W. 270, per *Parke* B. 273.
(*c*) 4 Bing. N. C. 54.
(*d*) 3 M. & W. 622.
(*e*) 2 C. M. & R. 1.
(*f*) Bull. N. P. 44.
(*g*) 6 Mod. 212.
(*h*) 6 East, 538.

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Lord DENMAN C. J.—The first objection to this plea is, that it does not commence with actionem non. I am of opinion that those words are not necessary, and I accede to the authority of the Court of Exchequer on that point. The second objection is, that the plea is bad as amounting to the general issue. The language of the new rules furnishes an answer, which states that in trover the plea of not guilty shall operate as a denial of the conversion only. The defendant says that he has taken the deer, and that he has done so rightfully. Has he then assumed to deal with the deer as the owner? He has deprived the owner of its use, and has himself exercised acts of dominion over it. That appears to me to amount to a conversion. Having then admitted what amounts to a conversion, has he justified? He says that he took the deer damage feasant as a distress, and it is admitted by the demurrer that he did so. If the plaintiff wished to shew that the distress had not been treated properly, he should have new assigned.

LITTLEDALE J.—I entirely agree as to the first objection, but as to the other objection have some doubt. I am not sure whether any conversion is admitted. In *M'Combie* v. *Davies* (*a*), Lord *Ellenborough* C. J. says, "I think that the defendant's acts amount to a conversion. According to Lord *Holt*, in *Baldwin* v. *Cole* (*b*), the very assuming to oneself the property and right of disposing of another man's property is a conversion." A seizure with intent to sell is a conversion. But I have a great difficulty in saying that any conversion is admitted in this case. If the defendant had said that he afterwards took the deer home and killed it, no doubt he would have admitted a conversion; but as the plaintiff complains of a conversion to the defendant's use, it seems strange to say that his admission that he took the animal as a distress is an admission of a conversion.

COLERIDGE J.—The first question would never have

(*a*) 6 East, 540. (*b*) 6 Mod. 212.

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arisen if the last plea had been considered part of the first plea, and consequently to the whole of the action. Since *Stancliffe* v. *Hardwick* (*a*) it must be taken that the general issue puts in issue the actual conversion only. But that plea would not have been adapted to the circumstances of this case, where the defendant means to admit the taking of the deer and to justify it. But has he sufficiently admitted and avoided conversion? If he had merely said that he drove the deer out of his close into the road and there left it, he would not certainly have admitted a conversion. But he alleges that he seized it as a distress, and thereby, as it appears to me, asserts a claim against the owner. If the deer had been misused after the seizure I think there would have been no difficulty in new assigning.

Judgment for the defendants.

(*a*) 2 C. M. & R. 1.

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Wednesday, February 6th.

In assumpsit on an express contract, which, on production at the trial, contains an interlineation in a material part, if the plaintiff prove that the instrument was originally executed without the interlineation, and in the form declared upon, the defendant cannot, on non assumpsit, contend that it has been avoided by the subsequent alteration.

ASSUMPSIT on a guarantee. The declaration contained two counts; the first was upon the instrument hereinafter set out as an absolute guarantee, and the second count declared on the guarantee for payment, "when the amount of the contract is paid." The defendants pleaded separately, first, non assumpsit to the whole declaration, and some special pleas, which it is unnecessary to mention. At the trial before Lord *Denman* C. J., at Westminster, at the sittings after Trinity term, 1836, in Middlesex, the following facts appeared. A person of the name of *Streather* having entered into a contract with government to complete some works at Woolwich, applied to the plaintiff, who was a brick merchant, for a supply of bricks. The plaintiff re-

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fused to supply any unless *Streather* found security for the payment, and he suggested that he should be satisfied with the guarantee of the defendants, who were the sureties to government for the completion by *Streather* of his contract. The defendants accordingly gave a guarantee, which, on production at the trial, appeared to be in the following form:

"Mr. *H. K. Hemming*,

"Please to deliver to Mr. *Robert Streather*, for the completion of the contracts at Deptford and Woolwich yards, five hundred thousand best stock bricks, to be delivered at the said dock yards, at 32*s.* per thousand, and we, as his sureties, do hereby consent that the proper officer, Navy Office, Somerset House, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered, and we do hereby agree to become *for the payment* guarantees ∧ of the same ∧ *to you when the amount of the contract is paid.* Dated this twenty-first day of August, 1833.

Yours, &c.

Sureties for Mr. *Streather's* performance of the contract, } *Mark Malim*, 3, Barnard's Inn. *Samuel Trenery.*

"*Robert Streather.*"

The plaintiff furnished bricks in consequence, and *Streather* having become a bankrupt before the works were completed, the present action was brought to recover the amount. 300*l.* had been paid by government to *Streather* during the works on account, but, as he failed to complete his contract within the time specified, government entrusted the work to other hands. For the defendants it was contended that, as the amount of the contract never was paid, the plaintiff should be nonsuited, on the authority of the decision in the Exchequer (*a*), which shewed that the guarantee was not absolute; his lordship was of opinion that the issues should be tried. Accordingly a witness for the plaintiff, named *Robinson*, stated that he saw the guarantee in the hands of the plaintiff on or about the day of the date of it; that it was then signed, and had not the words interlined in it; that he suggested to the plaintiff that he should

(*a*) *Hemming* v. *Trenery*, 2 C. M. & R. 385.

procure the defendants to insert an addition in it, fixing the time of payment, and that a few days afterwards the plaintiff shewed him the instrument with the interlineation added. The interlineation was proved to be in the handwriting of a Mr. *Spiller*, partner to *Malim*, who was an attorney. *Spiller*, and another witness for the defendant, stated that the draft agreement was prepared in the office of *Malim* and *Spiller*, and that *Spiller* made the interlineation in the agreement before it was executed, on his own responsibility. Lord *Denman* C. J. left it to the jury on the first issue to say, whether the interlineation was made before or after the guarantee was signed; if before it was signed, then that the verdict must be for the plaintiff on the second count; if after it was signed, then for the plaintiff on the first count. The jury found for the plaintiff on non assumpsit as to the first count, and on all the special pleas damages 560*l.* 16s.; for the defendant, on non assumpsit to the second count.

Sir *W. W. Follett*, in Michaelmas term, 1836, obtained a rule nisi for a new trial, on the ground that, as the written instrument when produced appeared to have an interlineation varying the contract, the learned judge ought to have told the jury that it was incumbent upon the plaintiff to make out by whom the interlineation was made, for that if it were made by the plaintiff alone, or by the plaintiff and defendants together, it would put an end to the original contract, and he cited *Powell* v. *Divett* (*a*) and *Bowman* v. *Nichol* (*b*).

Sir *J. Campbell* and *Archbold* shewed cause, in Hilary term, 1838 (*c*). The two cases cited were before the new rules (*d*), and are therefore inapplicable. The matter relied upon by the defendant is a defence in law, and therefore

(*a*) 15 East, 29.
(*b*) 5 T. R. 537.
(*c*) Jan. 23d, before Lord *Denman* C. J., *Littledale*, *Williams* and *Coleridge* Js.
(*d*) Hil. T. 4 *Will.* 4, Assumpsit I. 3.

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should have been pleaded, *Barnett* v. *Glossopp* (*a*), *Potts* v. *Sparrow* (*b*). Besides, after the evidence of *Robinson*, it must be taken that the alteration was made by *Spiller*, who was not the attorney for *Malim*, but his partner, and therefore a mere stranger to the transaction. That being so, the alteration was the act of a spoliator, and left the original agreement perfectly valid, as was held in *Henfree* v. *Bromley* (*c*), where an umpire, after having made his award ready for delivery and given notice thereof, altered the sum awarded to a larger amount, and Lord *Ellenborough* C. J. thought the alteration was no more than a mere spoliation by a stranger, which would not vacate the award. It is not pretended that *Spiller* had the authority of either of the defendants to make the alteration, and therefore the case is quite within *Henfree* v. *Bromley* (*c*).

Sir *W. W. Follett*, contrà. The plaintiff originally brought his action on the guarantee in the altered form, but when he found by the decision of the Court of Exchequer (*d*) that he was not entitled to recover upon it, he brings his action in this Court upon the guarantee without the condition, as being the original agreement. This shews the honesty of the proceeding. But he was not entitled to declare on this instrument in its original form. The leave of the Court has been improperly obtained to plead two counts, for they are substantially on one and the same contract, which the new rule forbids, and, as that rule has the force of an act of parliament, the Court has no jurisdiction to allow two counts to be pleaded. But, as to the count declaring upon the instrument without the interlineation, the defendant is entitled to succeed upon non assumpsit, if on its production the instrument appears to have been altered. If the instrument were altered by the plaintiff without the defendant's consent, the alteration invalidates it; if it were

(*a*) 3 Dowl. P. C. 625.
(*b*) 3 Dowl. P. C. 630.
(*c*) 6 East, 309.
(*d*) *Hemming* v. *Trenery*, 2 C. M. & R. 385; *S. C.* 1 Gale, 206.

altered by the consent of both parties, a new agreement is substituted. In either case the original agreement cannot be sued on. The authorities are collected in *Com. Dig.* Fait, (F), and *Markham* v. *Gonaston* (*a*). In the latter case it was held that an addition to a deed by a stranger, even although for the benefit of the obligor, made it void, and in *Cospey* v. *Turner* (*b*) the same law was recognized, although the defendant, by bad pleading, admitted the deed to be his. So in *Powell* v. *Divett* (*c*), where the vendor prevailed on the broker to alter the sale note, without the consent of the purchaser, it was held that the instrument was annulled. If the alteration had been made by the consent of both parties, a new contract would have been made; *Bowman* v. *Nichol* (*d*), *Downes* v. *Richardson* (*e*). The only case of an alteration which has been cited is that of *Henfree* v. *Bromley* (*f*), where the decision turned on the fact of the alteration being a mere unauthorized act by a stranger, but it is clear upon the evidence in this case, that the alteration was made at the suggestion of the plaintiff. *Barnett* v. *Glossop* (*g*), and *Potts* v. *Sparrow* (*h*), have been cited to shew that the present defence, being matter of law, cannot be set up under non assumpsit, but in *Lillie* v. *Price* (*i*) this Court decided that a privileged communication need not be pleaded specially, and in *Johnson* v. *Dodgson* (*k*), the Court of Exchequer expressed a strong opinion that the want of a sufficient memorandum in writing, under the Statute of Frauds, might be taken advantage of under the general issue. Suppose that, before the new rules, this alteration had been made with the consent of the defendant, he would not have pleaded it specially. Then what is the contract in the present case?—a promise to pay when the contract is completed, he therefore did not promise to pay absolutely. It

(*a*) Cro. Eliz. 626.
(*b*) Cro. Eliz. 800.
(*c*) 15 East, 29.
(*d*) 5 T. R. 537.
(*e*) 5 B. & Ald. 674; *S. C.* 1 D. & R. 332.
(*f*) 6 East, 309.
(*g*) 3 Dowl. P. C. 625.
(*h*) 3 Dowl. P. C. 630.
(*i*) 1 N. & P. 16.
(*k*) 2 M. & W. 653.

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is admitted, that if the alteration had been by a stranger the case would be different, but that is rebutted by the evidence.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—It appears that *Streather* had contracted to do certain works for government, and that the plaintiff, who was a manufacturer of bricks, engaged to supply a certain quantity of bricks to *Streather*, to assist him in the completion of the works, if the defendants would guarantee the payment for them under the terms agreed upon. An agreement in writing, containing the guarantee was entered into and signed by the plaintiff and the defendants; the bricks were supplied by the plaintiff, but *Streather* did not pay him for them, and he therefore applied to the defendants as the sureties for payment, but they objected to pay for the reasons given at the trial of the cause, but which it is not now material to advert to, and the plaintiff on that refusal brought the present action. The contract of guarantee, which was given in evidence at the trial, was in fact interlined, and that interlineation stated a condition that the guarantee should only attach and be binding when the amount of the contract was paid to *Streather*. This condition, therefore, limited the responsibility of the defendants, and was for their benefit.

An action had been brought in the Exchequer on the contract as interlined, and that Court was of opinion that the amount of the contract had not been paid to *Streather*, and that consequently the condition on which the guarantee was to attach had not arisen, and that the plaintiff was not entitled to recover.

The plaintiff has now brought an action in this Court, and he has two counts in the declaration; the first, on the contract without the interlineation, treating the guarantee as an absolute guarantee; and the second count, on the contract with the qualification in the condition.

The defendants have separately pleaded non assumpsit

to the whole declaration, and also some special pleas, which appear to apply to the last count only. The jury have found a verdict for the plaintiff on the non assumpsit to the first count, and for the defendants on the non assumpsit to the second count, and they have found for the plaintiff on all the special pleas; which last finding however is immaterial on the present inquiry.

The counsel for the defendants have applied for leave to enter a nonsuit, or for a new trial. As to the nonsuit no leave appears to have been given, and indeed it is abandoned. As to a new trial, it is moved for as a verdict against evidence, and for a misdirection. The case in the result turns out to be thus: a contract is adduced in evidence with an interlineation; if that interlineation was there before it was executed by the parties, that of course is the existing contract, and always was so, and, if such was the state of things, the plaintiff cannot recover. The Court of Exchequer have decided against him as to the law arising out of such a contract, and the jury have on this trial negatived the existence in fact of such a contract. But the jury have affirmed the existence of a contract without the interlineation. Now if the contract without the interlineation was signed by the plaintiff and defendants, it was then the actual existing contract of the parties, and would support the finding of the jury on the non assumpsit to the first count; but, as to the evidence of this being so, one witness for the plaintiff states it, but two witnesses for the defendant state that the interlineation was made at the time it was written out, and before it was signed by the parties; it was therefore a question for the jury to which of the witnesses they would give credit. Supposing the witness for the plaintiff was believed, and that the jury had come to the right conclusion as to the fact, that the contract had been executed by both parties without the interlineation, and that it did really once exist as such a contract, yet as it was exhibited to the jury with the interlineation, and therefore in an altered state from the original contract, the defendants contend that it ought to have been left to the

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jury to say by whom the alteration was made: 1st, Whether by consent of both parties: 2dly, Whether by the plaintiff: 3dly, Whether by the defendant: 4thly, Whether by strangers, i. e. by persons who took a part in these matters, and who might think that the agreement with the interlineation was what ought to bind the parties. As to the 1st, if it was altered with the consent of both parties, it would bind them, but would put an end to the original contract, as stated in the 1st count. As to the 2d, if the alteration was made by the plaintiff without the consent of the defendants (though for their benefit), it would, according to the authorities cited, put an end to the original agreement. As to the 3d, if it was altered by the defendants without the consent of the plaintiff, it would have no effect, and would remain as it was originally. As to the 4th, if the alteration was by the privity of the parties, it is not material to consider the general rules at present.

But, supposing the agreement to be vitiated by an interlineation, then comes the question whether this is open under the new rules upon non assumpsit, for there was once a valid contract, which is avoided by some subsequent act, and therefore the question arises whether it should not be pleaded. Here nothing was adduced to shew that the original contract was void in its inception. The issue was joined on the fact of its being executed. Now it was proved to have been executed. It was produced, indeed, at the trial, bearing on its face an alteration, which must have been made or sanctioned by the plaintiff, but that had been made after the execution. The promise then which the defendant denied has been established by the evidence, and if he had the means of defending himself it was by matter ex post facto. The rule of Hilary term 4 *Will.* 4, as to this is, "In all special assumpsits all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." It appears to us that the defence arising from the alteration of the contract falls

within the meaning of confessing and avoiding for the defendant on such a defence confesses that he made the contract, but he avoids it by shewing that the contract was afterwards avoided by the alteration. This defence by confession and avoidance arises from matter of fact only, and operates as a discharge from the contract rather than as shewing the transaction to be either void or voidable in point of law, because the transaction itself, which is the original, was neither void nor voidable in point of law. This we mention, because, if it operates as a discharge, it becomes unnecessary to consider the effect of the rule as to defences which arise as to matters of law, upon some of which a difference of opinion seems to be entertained by different judges, whether such defences may be set up on the general issue, or whether they must be pleaded, and as to which we may refer to the cases of *Barnett* v. *Glossop* (*a*), *Potts* v. *Sparrow* (*b*), and *Johnson* v. *Dodgson* (*c*).

But the Court was supposed to have assumed an extraordinary power in permitting several counts on the two inconsistent contracts, and the plaintiff to have taken a fraudulent advantage of that power, by declaring in this Court on the general contract, after proceeding on the conditional one in the Exchequer. For our own part we do not repeat the reasons that induced us to permit the insertion of two counts, but it is fair to remark, that there is no censure applicable to the plaintiff for claiming under both contracts, which will not equally attach on the defendant for denying both; and the execution of the former having been proved to the satisfaction of the jury, justice would have been defeated by a mere technicality if the defence had succeeded by proof that the plaintiff had contemplated the introduction of some alteration in the contract with a view to make it more favourable for the defendants.

Rule discharged (*d*).

(*a*) 3 Dowl. P. C. 625.
(*b*) Ibid. 630.
(*c*) 2 M. & W. 653.
(*d*) See *Knight* v. *Clements*, 3 N. & P. 375.

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COURT OF EXCHEQUER CHAMBER.

DOE on the several demises of SPILSBURY and another *v.* Sir FRANCIS BURDETT, Bart. and others.

DOE on the same demises *v.* SKYNNER and others.

Monday, February 4th.

A power was to be executed by will, signed, sealed, *and published*, in the presence of, and *attested* by, witnesses. A will commenced, "I *L. H. S.* &c. do publish and declare this to be my last will, and concluded, "I declare this to be my last will. In witness whereof I have to this my last will set my hand and seal," *L. H. S.* (L. S.) "Witness, *A. B.* and *C.*:"— Held, by *Vaughan* J., *Parke* B., *Alderson* B., and *Coltman* J., *dissent. Tindal* C. J., *Bosanquet* J., and *Gurney* B., that the publication of the will was not attested so as to satisfy the terms of the power.

ERROR from the Court of Queen's Bench. The special case stated for the Court below (*a*) having been turned into a special verdict, these cases now came before this Court on a writ of error. The power on which the question arose was contained in a settlement (of the 4th and 5th December, 1787,) on the marriage of *Lydia Henning Ward* with *William Augustus Skynner*, which, after reciting that *L. H. Ward* was seised of certain lands in fee, conveyed them to trustees upon trust to pay the rents and profits to *L. H. Ward* during her life, and immediately after the decease of the said *L. H. Ward*, to the use of such person &c. as the said *L. H. Ward*, whether covert or sole, *by her last will* or testament in writing, or any writing purporting to be or in the nature of her last will and testament, or by any codicil or codicils thereto, *to be by her signed, sealed, and published in the presence of* and attested by three or more credible witnesses, should give, devise, direct, limit, or appoint, and for want of such gift or appointment then over. Other lands were settled subject to a power in similar language.

Lydia Henning Skynner (late *Ward*) died on the 30th September, 1789, in the life-time of her husband *W. A. Skynner*, leaving no issue. She left at her death the following instrument purporting to be her last will and testament, dated 12th September, 1789.

"I, *Lydia Henning Skynner*, wife of *William Augustus Skynner*, Esq. of Gould's Green, in the parish of Hillingden, in the county of Middlesex, do publish and declare this to be my last will and testament.

"I appoint my beloved husband *William Augustus Skynner*, Esq. my executor, and my beloved mother *Lydia Ward* executrix with him. I give to my beloved mother" [here followed certain legacies and devises; and the will concluded thus:]—

(*a*) See 6 N. & M. 259.

" I declare this to be my last will and testament.

" In witness whereof I have to this my last will and testament contained in one sheet set my hand and seal the 12th day of September, in the year of our Lord one thousand seven hundred and eighty-nine.

" Witness, *Lydia Henning Skynner* (L. S.)"

Charles Ball.
Elizabeth Ball.
Ann Ball."

The special verdict also found that this will was signed, sealed and published by Mrs. *Skynner* in the presence of the above witnesses, and attested by them, and their attestation was in manner and form as appears in the instrument.

Doe v. *Burdett* was argued in Michaelmas vacation (Jan. 8th, 1837,) before *Tindal* C. J., *Park* J., *Vaughan* J., *Parke* B., *Bosanquet* J., *Bolland* B., *Alderson* B., *Gurney* B. and *Coltman* J., by Sir *F. Pollock* for the lessors of the plaintiff, and by Sir *J. Campbell* A. G., *Goulburn* Serjeant, and *Daniell*, for the different defendants (*a*).

Doe v. *Skynner* was argued in Hilary Term, 1837 (Jan. 10th), before the same learned judges, by *Wigram* for the lessors of the plaintiff, and *M. D. Hill* for the defendants. The whole subject is so fully discussed in the following judgments, that it has been deemed unnecessary to give the arguments of counsel.

Cur. adv. vult.

The judgment of the Court was pronounced this day.

COLTMAN J.—I regret that I am unable to agree in this case with the judgment of the Court of King's Bench.

The case of *Wright* v. *Wakeford*(*b*) is the leading one on the subject. The principle deducible from that case is, that if a power of appointment is given to be carried into

(*a*) *G. T. White* appeared for one of the defendants, but as his client appeared by the same attorney as one of the other defendants, the Court declined to hear him except as *amicus Curiæ*.

(*b*) 4 Taunt. 213.

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effect by a deed or instrument in writing, which is to be executed in the presence of and attested by two or more witnesses, there must be an attestation by the witnesses specifying that the instrument has been executed with all the formalities prescribed by the donor of the power.

Such, as I understand it, was the doctrine laid down in that case, and although there was a difference of opinion among the judges, the opinion of the majority was acquiesced in by Lord *Eldon* in the Court of Chancery, being evidently (as was stated by the Vice-Chancellor in the case of *Hougham* v. *Sandys* (*a*),) in accordance with the opinion he previously entertained, and that decision has never, as far as I can learn, been overruled by any subsequent judicial determination.

To place in a clear light the principles on which that case was decided, it will be proper to advert to the words used in the certificate of those judges whose opinion prevailed. A power had been given to be carried into effect with the consent of *Thomas Wood* the elder, and *Thomas Wood* the younger, testified by any writing under their hands and seals, attested by two or more credible witnesses. To this consent, say the judges, "two circumstances were made necessary, first, that it should be testified by some writing under their hands and seals, and, secondly, that the facts of their putting their hands and seals to such writing should be attested by two or more witnesses, so that the point in question appears to us to be simply whether the attestation asserts both these facts."

It has been suggested that this case may have proceeded on the ground that the witnesses, by specifying in their attestation that the instrument was sealed and delivered in their presence, must be considered as declaring negatively that it was not signed in their presence.

That such was not the ground of the decision appears still more distinctly from what was said by the judges a little below the passage already cited.

(*a*) 2 Sim. 142.

If, say the judges, it were to be determined as a matter of fact, whether the signature of the *Woods* was made in the presence of the same witnesses who attested their having sealed the indenture, a jury, under all the circumstances to which their attention might be directed, might perhaps not improperly presume the affirmative of such question.

That an attestation, specifying only a sealing and delivery in the presence of the witnesses where a signing also in their presence is required, ought not to be considered as importing negatively that the deed had not been signed in their presence, appears also from what was said by Lord *Eldon* in the case of *M'Queen* v. *Farquhar* (*a*). In that case the instrument was required to be signed and sealed in the presence of two or more witnesses. No attestation was required. The deed (as was also the case in *Wright* v. *Wakeford*) purported to be signed, sealed, and executed in the presence of three credible witnesses. The attestation was only sealed and delivered in the presence of &c. Lord *Eldon* said upon the question, whether after execution it ought to be taken that he did sign in the presence of the witnesses attesting the sealing and delivery, there would be a miscarriage in a judge directing a jury, if that fact was found, not to presume that the deed was signed in the presence of the same witnesses as it professed to be.

The case of *Wright* v. *Wakeford* was followed by that of *Doe* v. *Peach* (*b*), which I cite for the distinct enunciation it contains of the principle previously acted on in *Wright* v. *Wakeford*.

In *Doe* v. *Peach* the appointment was to be by deed or writing under hand and seal, executed in the presence of and to be attested by two or more credible witnesses. The form of attestation was sealed and delivered by the said *Robert Peach* in the presence of *Thomas Martin* and *John Seale*. It was said by the Court in giving judgment, "It seems to us that, to make a due execution of the power, there must be a making of an instrument with all the forms

(*a*) 11 Ves. 477. (*b*) 2 Man. & S. 576.

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required by the power, and that there must be an attestation of its execution with all those forms. The intention of the parties was, that the attestation should be co-extensive with the things required to be done."

This case has been followed by others in which the same doctrine has prevailed, and it is observable that, although many cases are to be found in our law books where powers had been given to be exercised by writing, executed in the presence of and attested by two or more witnesses, in none of them have the instruments been held to be well executed, unless the attestation itself either stated in express terms, or shewed by equivalent expressions, that the requisite conditions had been complied with; *Doe* v. *Pearce* (*a*), *Wright* v. *Barlow* (*b*), *Hougham* v. *Sandys* (*c*), *Ward* v. *Swift* (*d*), *Curteis* v. *Kenrick* (*e*).

It is to be observed, however, that dicta of two learned judges may be cited as qualifying in some degree the generality of the positions laid down in those cases.

In *Moodie* v. *Reid* (*f*) the appointment was required to be made by deed or will, signed and published in the presence of and attested by two or more credible witnesses. The donee of the power made her will, concluding in these terms:—"These my last bequeaths, signed by me this 4th day of February, 1812. *Sarah Moodie.* Witness, *Betty Headington, Jane Headington.*" *Gibbs* L. C. J., upon the argument, expressed an opinion that the signing was clearly attested, but seemed to doubt about the publishing. In the result the Court, after taking time to consider, certified the appointment not to be well executed; the reasons do not appear. With reference to the remark of Lord Chief Justice *Gibbs* it may not unreasonably be asked, how it appears that the will was signed in the presence of the witnesses? Does the simple signature by a witness of his name to an instrument import that he saw it signed; does

(*a*) 6 Taunt. 402.
(*b*) 3 Mau. & S. 512.
(*c*) 2 Sim. 95.
(*d*) 1 C. & M. 171.
(*e*) 3 M. & W. 461.
(*f*) 7 Taunt. 355.

it import more than that the instrument had been authenticated in his presence by the party executing it as a genuine instrument? The authentication may have been simply by an acknowledgment of his signature, which, according to the case of *Jones* v. *Dale* (*a*), is not sufficient, for, as there said by *Reynolds* J., "saying and doing are different things, and his saying he writ it himself will not amount to a subscribing in the presence of three witnesses."

The dictum of Lord Chief Justice *Gibbs* derives some support from what was said by the Vice-Chancellor, Sir *John Leach*, in the case of *Stanhope* v. *Keir* (*b*). In that case the power was to be executed by will signed and published in the presence of and attested by three or more witnesses. The will concluded as follows;—"This is my last will and testament made and signed in the year of our Lord 1818, on the 19th day of November, at Gravesend, in the county of Kent. *Eugenia Keir.* In the presence of *C. M'Donald Lockhart, Thomas Bennett, Alexander Edwards.*" The Vice-Chancellor, Sir *John Leach*, said on this case, "The argument for the defendant supposes the witnesses to be acquainted with the contents of the will. I cannot assume more than that they saw Mrs. *Keir* sign the instrument." The will was consequently held to be an insufficient execution of the power. In this case it is to be observed that the attestation contained the words "in the presence of," but did not specify what it was that was done in their presence.

The doctrine enounced in these dicta of Lord Chief Justice *Gibbs* and Sir *John Leach* was much extended in the subsequent case of *Buller* v. *Burt* (*c*), also before Sir *John Leach*. In that case the appointment was to be by deed, sealed and delivered in the presence of and attested by two or more witnesses. The instrument concluded with the following words, "Signed and sealed at Cotton aforesaid, this 13th day of September, in the year of our

(*a*) 1 Sugd. on Powers, 303, 6th ed.
(*b*) 2 Sim. & St. 37.
(*c*) 6 N. & M. 281, n.

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Lord 1813, by *L. Smith* (L. S.) Witness, *John H. Burt, Hannah Bowles.*" The Master of the Rolls is reported to have said, that the attestation of the witnesses being considered as a part of the appointment, it must follow that when the word *witnesses*, without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed. Upon this dictum I would take the liberty to remark, that the words of the deed are the words of the party executing it, not of the witnesses; and that I am unable to see on what grounds the declaration of the party, that the requisite conditions have been complied with, can be substituted for the attestation of the witnesses, or how we can be justified in assuming contrary to what the fact is likely to have been, that the witnesses are cognizant of the contents of the instrument, an assumption which in *Stanhope* v. *Keir*(*a*) the same judge seemed to think he should not be warranted in making.

In this case of *Buller* v. *Burt* (*b*), as well as in the two preceding cases, the execution of the instrument was held to be defective. The dicta to which reference has been made were not the foundations on which the judgments rested, we cannot know whether the opinions of those learned judges had been fully made up in regard to them so that they were prepared to act on them. Those cases therefore cannot be considered as having established judicially that any thing short of an attestation by the witnesses, co-extensive with the several acts required to be done, can be considered as a compliance with the requisite condition. To admit any thing short of this as sufficient, tends to introduce uncertainty and confusion into a question in which precision and certainty are of the greatest importance.

On these grounds I think that we ought not to fritter away the strict and intelligible rule laid down in *Wright* v. *Wakeford* (*c*) by the introduction of subtle refinements and nice distinctions.

(*a*) 2 Sim. & St. 37. (*b*) 6 N. & M. 281, n. (*c*) 4 Taunt. 213.

The result is, that the appointment in this case was ill executed, and therefore in my opinion the judgment of the Court below ought to be reversed.

Gurney B.—The question for the consideration of the Court is, whether Mrs. *Skynner* did or did not duly execute a power conferred upon her by her marriage settlement. (His lordship then stated the power and will.) The objection which is made to this is, that the attestation is not to be construed to extend beyond the act of signing and sealing. That it must not be construed to extend to the commencement of the will, "I do publish and declare this to be my last will and testament," nor even to the words, "I declare this to be my last will and testament," but merely to the very last words, "in witness whereof I have to this my last will and testament set my hand and seal," and therefore that the *publication* of the will is not attested, and the execution of the power is on that account invalid.

The Court of King's Bench has decided that this is a good execution of the power, and I think that that decision is right. The subject is by no means free from difficulty. The Courts of Westminster Hall have, by their anxiety to see powers strictly executed, been led, I think, into nice and refined distinctions, by which the intentions of the creators of those powers have been grievously disappointed.

It has been truly observed by Sir *E. Sugden* in his Treatise on Powers, that the decisions which have been made upon the execution of powers are at variance with the decisions which have been uniformly made upon the subject of the execution of wills under the Statute of Frauds; and I think that it has been unfortunate that these cases have been so decided. Not to mention the cases which occurred before the year 1812, the case which is considered to have settled the law upon this point is that of *Wright* v. *Wakeford* (*a*). In that case the terms of the power were,

(*a*) 4 Taunt. 213.

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"by any writing under *their hands and seals attested* by two or more credible witnesses." The form of the attestation was *sealed and delivered* by the within-named *A. B.* in the presence of &c. The objection was, that the attestation did not extend to the *signing*—it was an attestation of no more than of *sealing* and *delivery*, and the *sealing* and *delivery* being specified, it must be presumed that the witnesses did not mean to attest the *signing*. Lord *Eldon* sent this case to the Court of Common Pleas, and the Court was divided in opinion. Two certificates were returned—one by Lord Chief Justice *Mansfield*, that the attestation was sufficient. The other by Mr. Justice *Heath*, Mr. Justice *Lawrence*, and Mr. Justice *Chambre*, that it was insufficient.

It is perhaps too late to consider whether, if the case were now to occur, it would receive the same decision. I think it is very much to be lamented that the majority of the Court felt themselves compelled by antecedent cases to come to that conclusion—it can hardly be doubted that it defeated the intention of the creator of the power. If the word "attested" had not been in the power the decision would have been the other way. In the case of *M'Queen* v. *Farquhar* (*a*), where the power directed the instrument to be signed and sealed in the presence of witnesses (but did not require an attestation) and the attestation was to the sealing and delivery, Lord *Eldon* held, that the execution was good, and said it would be a miscarriage in a judge if he did not direct a jury to presume that the deed was *signed*, as it professed to be upon the face of it, in the presence of witnesses who attested the sealing and delivery.

It does not readily occur to one's mind, why a judge may not make the same presumption that he may direct a jury to make.

The case of *Wright* v. *Wakeford* has however been adopted since in several cases, and it is perhaps too late to be corrected if it be erroneous. But the case went to the

(*a*) 11 Ves. 467.

extremest verge and ought not to be extended. If I find a case in all its parts the same as *Wright* v. *Wakeford*, I may be compelled to yield to it, but not otherwise. The facts of this case are different, and I think that the execution in this case cannot be impeached but by extending the doctrine of *Wright* v. *Wakeford*(*a*).

In this case the testatrix does all that the power requires —she *publishes*—she *signs*—she *seals*. The attestation is *general*. I think that it is to be taken that the witnesses attested all three. I think that they may fairly be taken to be as cognizant of the last line but one as of the last line (if not of the first line as well as the last), and when the testatrix set about executing the power and has studiously done all that the power required, I cannot consent to presume that they who have given a general attestation did not witness the whole and attest the whole. Independently of all parol evidence it appears to me that it is the true conclusion from the premises. What is the publication of a will has been a matter of discussion in more cases than one; and in the case of *Moodie* v. *Reid*(*b*), *Gibbs* C. J. inquired of the bar what it meant, and received no answer; and he said that he was not surprised that he received no answer. If it means *nothing*, it would seem extraordinary that it should be requisite that *nothing* should be attested. If it means *anything*, I should suppose that it must mean that the testator, at the time of making the will, stated that that which he was so executing was his will. This it appears to me the testatrix has done, and this I think the witnesses have attested.

The last two cases that have been before the Courts have gone some way towards relaxing the extreme severity of the rule upon which the Courts had before acted. In the case of *Simeon* v. *Simeon*(*c*), the power directed the will to be *signed and published* in the presence of and attested by witnesses. The form of the attestation was *signed and deli-*

(*a*) 4 Taunt. 213. (*b*) 7 Taunt. 355. (*c*) 4 Sim. 555.

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vered in the presence of, &c. It was decided to have been well executed.

Ward v. *Swift* (*a*), in 1832, was a case sent by the Lord Chancellor for the opinion of the Court of Exchequer. The terms of the power were,—the will to be *published* under *hand and seal* in the presence of and *attested* by three witnesses. The attestation was *signed, sealed, and delivered.* The Court certified that the power was well executed. In both those cases *delivered* was held to be equivalent to *published.*

Upon the whole I am of opinion that the judgment of the Court of King's Bench should be affirmed.

ALDERSON B.—In this case, the circumstances of which have been already adverted to by my two learned brothers who have preceded me, the only question is, whether the power conferred by the settlement of the 4th and 5th December, 1787, on *Lydia Henning Ward,* has been properly executed by her.

The power was to be executed by an instrument to be by her signed, sealed, and published in the presence of, and attested by three or more credible witnesses.

Now, what is it that is required by such a power? That must depend entirely on technical rules, and on the authorities to be found in our books. In all cases, but most especially in those relating to real estate, it is of the greatest importance to adhere to established rules. Even if we think that originally they were established on what now appear to us insufficient reasons, we ought to adhere to them, because men have, in all probability, accommodated themselves to them, and in the creation of their subsequent instruments acted upon them, so that it will almost inevitably happen, that in overruling them we shall do the greatest injustice to those who have relied upon the faith of the decisions, and contradict also the actual intentions of innocent parties. Thus to act, is to introduce into the law

(*a*) 1 Cro. & M. 171; *S. C.* 3 Tyrw. 122.

and into a branch of it in which certainty is of the greatest importance, the greatest uncertainty and fluctuation of opinion. And I think that the evil is, if possible, increased, by distinguishing cases on minute and trivial grounds, and practically, although not in terms, overruling the prior decisions. If, therefore, the examination of the cases already decided leads me to the conclusion that the word "attest," in such a power as this, means "subscribe a memorandum of attestation," and that in order to make such execution valid the attestation must express all the requisites which the witnesses are called upon to attest, I must, however I may regret it, hold that this power is ill executed, and that the decision of the King's Bench is wrong. And this is the conclusion at which, after much consideration, I have arrived.

The leading case on this point is that of *Wright* v. *Wakeford* (*a*). There the power was required to be executed by an instrument under hand and seal, attested by two witnesses; the memorandum of attestation expressed that it was "sealed and delivered," and was silent as to the fact of signature, but the deed itself purported to be executed in the pursuance of the power therein recited, and was actually signed as well as sealed. The majority of the judges of the Court of Common Pleas certified their opinion to the Lord Chancellor to be, that the power was ill executed; and in their certificate (after admitting that a jury might, as a question of fact, have come to the conclusion that the witnesses saw the signing as well as the sealing and delivery) say that as a question of law it must be determined by the true construction of the terms of the attestation to which the consideration must be confined, and that the signature was not comprehended *in the words used in the attestation.* And even Lord Chief Justice *Mansfield*, who differed from them, seems to me to have construed (more liberally indeed, but still to have construed) the words of the attestation as including signature, rather than to have come to the

(*a*) 4 Taunt. 213.

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conclusion that attested was not to be considered as requiring an expression in writing of the particulars requisite for the due execution of the power.

This case appears to me, as plainly as words can express it, to have decided that "attest" means "subscribe a memorandum of attestation, containing all the particulars required for the due execution of the power." This case has never been overruled, but, on the contrary, has been expressly confirmed by the cases of *Doe* v. *Peach* (*a*), *Wright* v. *Barlow* (*b*), and *Hougham* v. *Sandys* (*c*), in which the same defect was held fatal to the execution of the power, and by the introduction of a Bill into Parliament, 54 *Geo.* 3, c. 168, whereby the inconvenience resulting therefrom was in part remedied.

It is indeed contended that these cases are distinguishable from the present, because the memorandum of attestation there expressly contained some of the requisites, and the maxim expressio unius est exclusio alterius is applied. To my mind this is not just reasoning. *Wright* v. *Wakeford* (*d*) decided, if it decided anything, that the requisites must be expressed in the attestation; whereas the maxim referred to has only reference to inferences of fact, to be drawn from written documents or parol declarations. It only means that, if you expressly name some out of certain requisites, the inference is stronger that those omitted are intended to be excluded, than if none at all had been mentioned. Neither can, however, exclude the real fact from being proved or shewn. But, according to *Wright* v. *Wakeford* (*d*), the requisites must all be expressed in the written attestation—a decision which leaves nothing to inference, and puts the omission of any one on exactly the same footing as the omission of all. Such a distinction, therefore, would practically overrule *Wright* v. *Wakeford* (*d*), and the

(*a*) 2 Mau. & S. 566.
(*b*) 3 Mau. & S. 512.
(*c*) 2 Sim. 95.
(*d*) 4 Taunt. 213.

other cases which follow it, whilst in words it supported them. But there are not wanting cases in which a general attestation has also been held equally within the rule. In *Moodie* v. *Reid*(*a*) the attestation was only "Witness, *B. H.* and *J. H.*" The Court of Common Pleas held it a bad execution of a power which required a will to be signed and published in the presence of and attested by two witnesses. Again, in *Stanhope* v. *Keir*(*b*) the attestation was "In the presence of," and in *Buller* v. *Burt*(*c*) "Witness." In all these the execution was held bad, although, in all, the facts had taken place in the presence of the witnesses which they were required to attest. But they were decided upon *Wright* v. *Wakeford*(*d*), and in *Hougham* v. *Sandys*(*e*), the Vice Chancellor expressly says, in expounding *Wright* v. *Wakeford*(*d*), that the proper meaning of the term attest was, that the witnesses should, *by the written attestation*, give their evidence to the fact that the instrument was signed as well as sealed. But then it is said, and on this the decision in the King's Bench turned, that in construing a general attestation the Court is at liberty to look beyond the mere attestation, and even to look at the whole of the deed for that purpose. Sir *John Leach* is reported to have said, in *Buller* v. *Burt*(*c*), that when the word "witnesses," without more, is used in the attestation, it must be taken to affirm that all has been done in the presence of the witnesses, which is stated in the body of the deed. If this principle be true, there can be no doubt that the decision in the King's Bench in this case is right. But I cannot agree to the principle, which appears to me founded on a forgetfulness of the learned judge, or, which is perhaps the case, a misapprehension of the reporter, as to the distinction which the previous cases had established between "attesting" and "witnessing" a deed. There is no doubt, as was laid down by Lord *Eldon*, in the case of *Mac-*

(*a*) 7 Taunt. 355,
(*b*) 2 Sim. & Stu. 37.
(*c*) 6 N. & M. 259.
(*d*) 4 Taunt. 213.
(*e*) 2 Sim. 142.

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queen v. *Farquhar* (*a*), that if a power is required to be executed in a particular way, in the presence of witnesses, and the attestation be general, the Court or jury may look at the whole deed, and may infer, as a conclusion of fact, that what is stated in the deed to have been done, was done in the presence of the witnesses. The deed itself is primâ facie evidence of this, and may be looked at for that purpose.

For in those cases the requisities may be properly ascertained by such inference, or by parol evidence of the fact. But the cases which we are considering require that the requisites shall not only be witnessed, but attested, and in order to fulfil the meaning of the word "attested," they decide that what the witnesses have witnessed they shall state that they saw done. And this, I think, can only be done by the attestation clause itself, which contains that which the deed does not, the declaration of the witnesses themselves. The deed shews what the party executing it did at the time; and we may perhaps infer from that, that the witnesses saw it done, but the attestation itself alone can, as it seems to me, *express* the facts which they saw and attest. In these powers, the creator of them did not mean to leave any thing to inference. That, at least, is what the case of *Wright* v. *Wakeford* (*b*) and those depending on it must, I think, be taken to have decided on this subject.

To construe the attestation by reference to the body of the deed, is moreover directly at variance with several of the decided cases. In *Doe* v. *Peach* (*c*), the deed contained a statement of the requisites having been complied with; and that too in the very terms of the power; yet the decision was, that the power was ill executed. So in *Wright* v. *Wakeford* (*b*), and the others which resemble it, the fact of the signature appeared on the face of the deed. In *Stanhope* v. *Keir* (*d*) the testimonium clause began, "And this is my last will," which, if said in the presence of the witnesses, was a clear publication; yet Sir *John Leach* held it ill executed, saying

(*a*) 11 Ves. jun. 477.
(*b*) 4 Taunt. 213.
(*c*) 2 Man. & S. 576.
(*d*) 2 Sim. & Stu. 37.

expressly, "that the declaration with which the will concluded was in fact a publication as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts, supposed the witnesses to be acquainted with the contents of the will. He could not assume more from this attestation than that the witnesses saw the testatrix sign the instrument." This reasoning would make me think that the dictum of Sir *John Leach*, in *Buller* v. *Burt* (*a*), which it may be observed was one wholly unnecessary to the decision in that case, has been inaccurately reported (*b*). At any rate, it is at variance with several other decisions, and is, I think, contrary to principle, for the reasons which he has himself given. The same does not indeed apply to the dictum of *Gibbs*, C. J., in *Moodie* v. *Reid* (*c*), for that may depend on the attestation of the witnesses being placed opposite to the signature of the testatrix, in which case it agrees with the observation to be found in *Stanhope* v. *Keir* (*d*).

These two dicta, however, both unnecessary for the decisions of the respective cases, and both at variance with several decisions, are not sufficient authority, in my opinion, for the decision in this case. Neither can I find any authority for referring to the testimonium clause, even if that would do (which I think it would not) to support this judgment. If any part of the deed can be looked at, I do not see why the whole may not be taken into consideration.

Upon the whole, my opinion is, that, in conformity to *Wright* v. *Wakeford* (*e*), and the other decisions following it, we ought to hold that it is necessary to express in the attestation itself that the requisites have been complied with. It is not, indeed, necessary that the very words of the power should be followed; if there are words capable

(*a*) 6 N. & M. 281 n.

(*b*) The report of the judgment of Sir *J. Leach* M. R., in 6 N. & M., has been compared with the judgment in his Honor's handwriting, and is found to be accurate.

(*c*) 7 Taunt. 355.

(*d*) 2 Sim. & St. 37.

(*e*) 4 Taunt. 213.

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of bearing the construction, it is enough. *Ward* v. *Swift* (*a*), *Simeon* v. *Simeon* (*b*), *Lempriere* v. *Valpy* (*c*), and the late case in the Exchequer (*d*), have decided that any words in the attestation, shewing the will or instrument to have been completed as an operative instrument, will satisfy the word "published," or the word "delivered," in a power; but there must be some expression capable of receiving a construction to the effect required. I think that it is not competent to supply any defect in the attestation, by resorting to the words of the deed, or even of the testimonium clause, because to do so seems to me to suppose the witnesses to see the deed, which is contrary to the fact in most cases, and to supply, by inference alone, that which, according to the decided cases, the party creating the power meant should be expressed in the attestation itself, and not left to inference at all. I concur with Sir *E. Sugden* in his Book on Powers, in wishing that these cases had at first been decided in conformity to those on the Statute of Frauds; but I am bound by their authority. For these reasons I think the judgment of the King's Bench ought to be reversed.

Note.—This is the construction put upon these cases by Sir *E. Sugden*, as appears from the act drawn by him, and which is to be found, No. 8, in the Appendix to his Book on Powers. The preamble to that act is as follows:—"And whereas the form of the attestation, frequently from ignorance or inadvertence, has not contained the full statement of the acts, which the witnesses were required to attest, whereby titles have been defeated &c." This shews what this eminent lawyer takes to be the result of the cases.

BOSANQUET J.—After much consideration, and some fluctuation of opinion, I think that the case affords suffi-

(*a*) 1 C. & M. 171.
(*b*) 4 Sim. 555.
(*c*) 5 Sim. 108.
(*d*) *Curteis* v. *Kenrick*, 3 M. & W. 461.

cient ground for affirming the judgment of the Court of Queen's Bench.

It may be assumed, as a rule now too well established to admit of dispute, that where the instrument, which creates a power, prescribes certain formalities to be observed in the execution of it, and attested by witnesses, the witnesses must attest all those formalities, and their attestation must appear upon the face of the instrument executed.

In *Wright* v. *Wakeford* (*a*), Lord *Eldon* expressed his opinion, that the proper meaning of the term "attest" was, that the witnesses should, by their written attestation, give evidence to the fact, that the instrument was signed as well as sealed and delivered. And Lord *Ellenborough*, in delivering the opinion of the Court in *Doe* v. *Peach* (*b*), says, "To make a due execution of the power, there must be a making of the instrument, with all the forms required by the power, and there must be an attestation of its execution, with all its forms." If, therefore, signing, sealing, and publishing be required, and any one of them be unattested, the execution of the power will be void.

The question then is, whether the publication of the will before the Court appears upon the face of the will to have been duly attested?

The signatures of the three witnesses are immediately preceded by the word "witness" only, unaccompanied by the ordinary memorandum expressing what the facts are which they profess to attest.

It must be admitted that, in the absence of any such memorandum, it cannot be urged that, by professing in terms to attest, signing and sealing, the attestation of publication is excluded.

But the question remains, what have they attested?

The will begins in these words: "I, *Lydia Henning Skynner*, wife &c., do publish and declare this to be my last will and testament." It then proceeds:—

(*a*) 17 Ves. 454. (*b*) 2 Mau. & S. 581.

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"I appoint my beloved husband" &c., (and after making several dispositions of property, concludes thus:) "I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September. *Lydia Henning Skynner.*

"In the year of our Lord 1789.

"Witness, *Lydia Henning Skynner.* (L. S.)

"*Charles Ball.*

"*Elizabeth Ball.*

"*Ann Ball.*"

The whole will, including the seal and signature of the testatrix, and the attestation of the witnesses, was on one sheet.

The first signature was at the bottom of the second page, and what follows was written on the top of the third page of the same sheet, the seal and signature of the testatrix being on the right side of the page, and the word "witness" and the names of the witnesses immediately opposite to them on the left side.

The donor of a power, in creating it, may undoubtedly prescribe whatever ceremonies he may think proper to accompany the execution; and, if he requires the observance of such ceremonies to be attested, the attestation of them ought so to be manifested, that all, who derive title under the instrument executed, may thereon see recorded the testimony of the witnesses to the due observance of those ceremonies. In this case, after the word "witness," the names of the three witnesses, without more, are subscribed. But the testatrix, by the concluding clause of the will, professes to have declared this to be her last will and testament, and in witness thereof to have set her hand and seal; and if the signature of the witnesses can be referred to that clause, it may be taken to declare their attestation of what that clause contains.

It certainly is not necessary that the memorandum of attestation should be written by any of the witnesses themselves; nor is it usual for any of them to write it, if they

sign such a memorandum, though they may never have read it, that is enough to constitute a written attestation. And it appears to me that, in the present case, by signing under the word witness, without more, we are justified in holding that the witnesses have adopted the words used by the testatrix in that clause of the will immediately above their own signatures, which describe the mode of execution. If that be so, have they not attested the publication of the will as well as the signature and seal of the testatrix? I fully admit that the terms of the instrument which created the power must be taken to import that publication is something more than signing and sealing. This was the opinion of Lord *Hardwicke*, who, in speaking of a trial at bar in the King's Bench, upon the will of Mr. *Windham* of Clearwell, said (*a*), "the only question was, whether the testator *published* it; for there was no doubt of his executing it in the presence of three witnesses, and their attesting it in his presence, which shews that publication is, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form." Whatever the nature of the act may be therefore, it is some act which is required both to be done and to be attested. I am disposed to agree in opinion with those of my learned brothers, who think that the execution of the power in this case is not to be supported upon the ground that the witnesses, by subscribing their names, have attested the publication mentioned at the commencement of the will. To assume that the witnesses were made acquainted with the contents of the will would be to assume what is contrary to all experience. It is not necessary, to the validity of an attestation, that the witnesses should even know the nature of the instrument which they attest, *White* v. *The British Museum* (*b*); and an attesting witness is not considered in practice as affected with the contents of an instrument to which he has subscribed his name (*c*). I find no principle,

(*a*) 3 Atk. 161.
(*b*) 6 Bing. 310.
(*c*) See Sugd. V. & P. 655, 4th ed.

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therefore, upon which it can be inferred, that the witnesses who have subscribed the will in question were cognizant of the words at the beginning of it, which purported that the testatrix had published the paper as her will, and that they professed to bear witness to her having so done. But when the testatrix, after having completed all the dispositions of her property, concludes with these words: "I declare this only to be my last will and testament. In witness whereof (that is, of which declaration,) I have set my hand and seal." And the witnesses add immediately after "witness."

C. B.
E. B.
A. B.

I think that there is just ground for holding that the witnesses profess to add their witness to the witness of the testatrix, with respect to the manner in which she has executed her will.

If the witnesses had subscribed a memorandum in the following words, "Declared to be the only last will and testament of *L. H. S.* In witness whereof she has set her hand and seal this 12th September, 1829," there could, I apprehend, be no doubt, that a publication as well as signature and seal would have been duly attested. For if a declaration be something, in addition to signing and sealing, it must, I conceive, amount to publication. When the witnesses subscribe their names, they must be supposed to profess that they attest something.

In the absence of any special memorandum, what do they profess to attest? If they attest the seal and signature, why do they not attest the declaration of the testatrix also, which is recorded in the same clause with her signing and sealing?

It appears to me that the testatrix and the witnesses may be considered as having signed the same memorandum of execution, that what she professes to testify they also testify; and that their attestation, subscribed to what they witness, is to be understood as if it were written,

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"witness to the same." How refined is the distinction between signing immediately under the testimonium clause, and signing the same terms an inch below it on the same page, in the form of a memorandum. I do not find that any of the cases are inconsistent with the view which I have taken of the subject. If indeed it has been settled by judicial authority that, notwithstanding the concluding clause of the will descriptive of the ceremonies, a distinct memorandum of attestation is necessary to satisfy the power, cadit quæstio, for there is no such memorandum in this case. I should certainly think it my duty to bow to such authority, for the reasons well stated by my brother *Alderson*, but I do not find that any such rule has been established; and I do not feel myself called upon to extend an arbitrary principle with respect to the validity of wills, executed under powers, by which a disposition of property actually accompanied with all the ceremonies prescribed by the power is to be defeated, and which is at variance with the principle applied to wills executed under the Statute of Frauds. In the case referred to of *Wright* v. *Wakeford* (*a*), the power was to make sale by writing under hands and seals, attested by witnesses. The testimonium clause stated the instrument to be both signed and sealed, but the attestation was only "sealed and delivered by the testator in the presence of (the witnesses)." And it was held by *Heath*, *Lawrence*, and *Chambre*, Js. against *Mansfield* C. J., that the power was not duly executed for want of attestation of the signing, no mention of signing having been made in the special memorandum of attestation. *Moodie* v. *Reid* (*b*), was the case of a power to dispose by will, signed and published in the presence of and attested by two witnesses. The will concluded in these words: "These my last bequeaths signed *by me* this 4th day of February 1812, *Sarah Moodie*. Witness, *Betty Headington*, *Jane Headington*," making no mention of publication. *Gibbs*

(*a*) 4 Taunt. 213. (*b*) 7 Taunt. 355.

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C. J. said, "the power is to be exercised by a will signed and published, therefore there must be some publication. The will must be signed, published, and attested, there must be some attestation here of signing and publication. It is established by *Wright* v. *Wakeford* (*a*), that the witnesses must attest every thing that is necessary for the execution of the power. *Here the witnesses have clearly attested the signing;* the question is, whether they have attested the other formalities of publication in attesting the signing."

Now it must be observed that, unless the signature of the witnesses could be coupled with the clause which stated the signing, there was no attestation of that act, any more than of the publication. The Chief Justice proceeds: "If the act of the testatrix calling on the witnesses to attest her will, be a publication of it, then their attestation that she signed it, attests her publication also, because they attest that by which she publishes it." The Court took time to consider of their opinion, and then certified that the will was not a due execution of the power, thereby deciding that signing her last bequeaths in the presence of witnesses did not amount to a publication.

If the testatrix in that case had in *fact* called upon the witnesses to attest her last bequeaths, or stated that she had done so, that circumstance would have justified them in attesting a publication. But there was nothing to shew by the attestation that any thing of the kind had taken place. And the concluding words of the testatrix "these my last bequeaths signed by me," contain no assertions of her having done an act of publication, to which the attestation of the witnesses could be ascribed. She might have signed, and the witnesses might have attested such signature, and yet the testatrix might never have done any thing beyond signing to manifest publication, as required by the power. In *Stanhope* v. *Keir* (*b*), the power was to dispose

(*a*) 4 Taunt. 213. (*b*) 2 Sim. & St. 37.

by will signed and published in the presence of and attested by witnesses. The will concluded. "This is my last will and testament made and signed A. D. 1818, 19 November, at Gravesend in the county of Kent.

Eugenia Kier. (L.S.)

In the presence of *C. M. L.*
T. B.
A. E.

Sir *John Leach* V. C. said, "He could not assume more from the attestation than that Mrs. *Kier signed* the instrument, and that as the *publication* was not attested, the power was not well executed. Here again the Vice-Chancellor treats the witnesses as adopting the statement in the testimonium clause, that the will had been signed by the testatrix. If a distinct memorandum of attestation was necessary, the signing was as much unattested as the publication. *Buller* v. *Burt* (*a*) was the case of a power to dispose by deed, sealed and *delivered* in presence of and attested by witnesses. The instrument concluded, "signed and sealed at &c. by *L. Smith,* (L. S.) Witness, *H. Burt, Hannah Bowles.*" Sir *John Leach,* then Master of the Rolls, held the power not to be well executed, because delivery was not attested. He said, that where the word "witnesses," without more, is used on the attestation, it assumes that all has been done in the presence of the witnesses which is stated in the body of the deed, that in the body of the deed it was stated to be signed and sealed, but not said to have been delivered; and as the word "witnesses" could affirm no more than the deed stated, there was no attestation of delivery. If by the body of the deed the Master of the Rolls must be understood to mean the general contents of the deed, his dictum may well be doubted, since it must assume the witnesses to be acquainted with those contents. But if he meant only the testimonium clause, which immediately preceded the word "witnesses,"

(*a*) 6 N. & M. 281, n.

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the observation may be just, upon the supposition that the witnesses, by subscribing their names after the word "witness" only, incorporated in their attestation the description of the formalities immediately preceding it. To suppose that the Master of the Rolls meant more than this would be inconsistent with his observations in *Stanhope* v. *Keir* (*a*), where, in answer to the argument of counsel, that the witnesses by signing had attested a declaration of the testatrix, which amounted to a publication, he said, "the argument supposes the witnesses to be acquainted with the contents of the will; I cannot assume more from this attestation than that they saw Mrs. *Keir* sign the instrument."

The last case to which I shall refer is *Ward* v. *Swift* (*b*). The power was to appoint by deed &c., or by will, duly executed and *published* under hand and seal, in the presence of and attested by witnesses. The will concluded, "In witness whereof I have set my hand and seal, 5 August, A. D. 1801, in the presence of the underwritten. (L. S.) Signed, sealed, and *delivered*, 5 August, 1801, as the last will and testament of *M. S.*, who in her presence, and in the presence of each other, have put our names as witnesses thereto." This was held by the Court of Exchequer to be a good execution of the power, the delivery of the instrument as a will, which was attested, being justly deemed a publication within the meaning of the power, the word "delivered" in the attestation being very properly held to satisfy the word "published" in the power. In the present case, it appears to me that the word "declared" ought to have the same effect. I am quite aware of the expression of Lord *Eldon* in the case already cited of *Wright* v. *Wakeford* (*c*), that "the meaning of the term 'attest' is, that the witnesses by their written attestation should give evidence to the fact that the instrument was signed as well as sealed." But it certainly is not necessary that they should write any thing but their own names, provided their names are subscribed

(*a*) 2 Sim. & St. 37.
(*b*) 1 C. & M. 171.
(*c*) 17 Ves. 454.

to the written expression of the ceremonies having been observed. So that the question still must be, whether the witnesses have or have not subscribed such written expression of acts done as the power requires; and it must be remarked, that all the cases above referred to, in which the simple signatures of the attesting witnesses appear to have been thought referable to the testimonium clause of the will, have occurred since the case of *Wright* v. *Wakeford* (*a*). In the various cases where the execution of the power has been held insufficient for want of attestation of some particular ceremony, the attestation of that ceremony was either excluded by the terms of the memorandum of attestation, or there was nothing in the language of the clause descriptive of the ceremony observed in the execution of the instrument to which the signatures, unaccompanied by any memorandum of attestation, could be referred; there is therefore no case in point to govern the decision of the Court. It must be borne in mind that the only question is, whether what appears upon the face of the instrument can be fairly construed by the Court to amount to a declaration that the witnesses have attested publication. A determination in the affirmative does not dispense with proof of the fact, that the will was actually published, and published in the presence of the witnesses, without which proof the most precise memorandum of attestation would be of no avail.

In this case, it appears by the special verdict, that the will was actually published as required. Thinking therefore as I do, after the best consideration which I have been able to bestow upon the case, that consistently both with principle and authority, we are at liberty to hold that the witnesses have attested a *declaration* of the testatrix, that the instrument which they subscribed was her last will, as well as that she signed and sealed it; I am of opinion that the power has been duly executed.

Parke B.—The question in this case is, whether the

(*a*) 4 Taunt. 213.

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will of *Lydia Henning Skynner* was a due execution of the power given by the 4th and 5th December, 1787. (His lordship then read the power and the will.) It is with great regret that I have come to the conclusion that the power was not duly executed. The cases of *Wright* v. *Wakeford* (*a*), *Doe* v. *Pearce* (*b*), and *Doe* v. *Peach* (*c*), (which I cannot help considering unfortunate decisions,) have established this rule of construction, that, if the donor of a power requires an instrument to be executed with certain formalities in the presence of and attested by witnesses, he must be understood to mean, not merely that the *instrument*, but that all the required *formalities* shall be attested by the witnesses, and stated by a memorandum in writing to have taken place in their presence, the presumed intention being that there should be on the face of the instrument itself, a memorial that all the conditions necessary to the due execution of the power have been complied with. Those decisions have since been followed by others, in which it has been held that a general form of attestation by the use of the word "witnesses" is insufficient, where the power required a will to be signed, sealed and *published*, in the presence of and attested by witnesses, on the ground that there was no attestation of the fact of publication, which is something beyond the mere act of signing and sealing. These are the cases of *Moodie* v. *Reid* (*d*), *Stanhope* v. *Keir* (*e*), *Buller* v. *Burt* (*f*), and *Allen* v. *Bradshaw* (*g*), and by these decisions I consider that we are bound; and it would be a most dangerous course to overrule them directly, or to elude their authority, by relying on slight and unsatisfactory distinctions, since the rights acquired under them, and titles accepted on the faith of them, might be thereby disturbed. In no branch of the law is it so important as in this, to abide by previous decisions.

(*a*) 4 Taunt. 213.
(*b*) 6 Taunt. 402.
(*c*) 2 Mau. & S. 576.
(*d*) 7 Taunt. 355.
(*e*) 2 Sim. & St. 37.
(*f*) 6 N. & M. 281, n.
(*g*) 1 Curteis, 110.

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I am compelled therefore very reluctantly, and only in consequence of these cases, to say, that the present attestation is insufficient, inasmuch as it does not, by express words or implication, contain a statement that all the three requisites of the power were complied with, unless the ground which was taken by the Court of King's Bench, and relied upon in argument in this Court, can be supported. That ground is, that the witnesses must be taken to attest what is stated in the body of the instrument, and that all the requisites are in this case stated in the body of the instrument to have been performed.

I do not think this distinction satisfactory. It proceeds upon the supposition that the whole instrument may be read together to explain the meaning of the word "witnesses," which necessarily presumes that the attesting witnesses are conusant of the contents of the instrument, of which in practice they certainly are not; and it would be a dangerous doctrine with reference to their interests, to assume that they had knowledge of all that is stated therein. *The memorandum of attestation alone is their act.* It may be, as was said by the Attorney-General, that they do not read even this, when it is prepared for them, any more than the deed itself, and very often they do not; a course which is very negligent and improper, for witnesses ought not to subscribe a statement which they do not know to be perfectly true, but still it is their act; and if it expresses all that the donor of the power required, and all was really done, the power is in that respect well executed. But this is no reason for holding that the whole instrument, which they never read in the ordinary course of business, may be referred to, in order to explain the memorandum of attestation, and to shew that the witnesses mean to attest the performance of the required formalities. I must own I have a great difficulty in saying, that any thing which precedes the signature and seal to the instrument can be connected with and read as part of the memorandum of attestation. Even the concluding or witnessing part, the testi-

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monium clause, as it is sometimes called, in which the *maker of* the instrument denotes by some expressions that *he* signs and seals in witness of the completion of the instrument, cannot be assumed to be known to the witnesses. But supposing that it is, this clause in the present case states only the setting the hand and seal of the testatrix to the will, which, according to *Moodie* v. *Reid* (*a*), and *Stanhope* v. *Keir* (*b*), and *Allen* v. *Bradshaw* (*c*), and other cases, is not enough; and even supposing the memorandum of attestation to be connected with the whole will, I do not see that the will does, in this case, state that the formalities were intended to be complied with. It does not appear that the testatrix has declared the will to be hers, or meant so to declare in the presence of the witnesses. "I declare I publish this to be my last will," in the beginning, and "I declare this only to be my last will," at the end, do not import more than that *by the act of so writing* she publishes and declares it to be her will, not that she so publishes and declares it, as an independent act, in the presence of "witnesses." The expression in *Moody* v. *Reid* (*a*), "these my last bequeaths, signed by me," is equivalent to saying "I declare these to be my last bequeaths;" the words in *Stanhope* v. *Keir* (*b*), "this *is* my last will and testament," have the same meaning; so that even if the whole is read together, the case cannot be satisfactorily distinguished from those authorities. Even then if we should adopt the proposition, that all the instrument might be read to explain the general term "witnesses," and that, where the instrument purported, on the face of it, to be intended to be made with all the precise formalities required by the power, so that the donee of the power must have had those formalities distinctly in his mind, the general term "witnesses" must be intended to mean that all those formalities were witnessed by persons subscribing, (a proposition which I think

(*a*) 7 Taunt. 355.
(*b*) 2 Sim. & St. 37.
(*c*) 1 Curteis, 110.

cannot be supported, and for which there is, I believe, no other authority than the dictum of Sir *John Leach*, in *Buller* v. *Burt* (*a*),) yet still this instrument does not answer the supposed description, for it does not appear by any statement therein, that the maker of it had those precise formalities in contemplation.

I am obliged, therefore, to come to the conclusion that this judgment cannot be supported upon the ground on which it was rested by the Court of King's Bench; and the authority of the decided cases prevents it being sustained, on the ground that the general form of attestation implies a statement that the witnesses saw not only the acts of signing and sealing, but those acts done *as indicative of a completion of the instrument*, which would probably amount to a publication. As long as those cases remain unreversed by the highest tribunal, we are bound by them, though we may doubt or disapprove of the reasons on which they proceeded. I am therefore of opinion that the judgment of the Court of King's Bench ought to be reversed.

VAUGHAN J.—After the able and elaborate judgment delivered by the learned barons and my brother *Coltman*, with whom I concur, perhaps I might abstain from entering upon the reasons which have brought my mind to the same conclusion, but as the Court below were unanimous in their judgment, which deservedly challenges the highest consideration, I feel it more respectful to state shortly the grounds of my opinion, without minutely investigating or commenting upon the cases which have been cited.

The execution of a power derives its validity solely from a compliance with the terms under which it was created, and when an attestation is required, it is in order that the witnesses may pledge themselves to the fact that those terms have been fulfilled. The donor of the power, the execution of which we are now considering, engrafted upon its exer-

(*a*) 6 N. & M. 281, n.

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cise a condition that it should be appointed by will or codicil, "to be signed, sealed and published, in the presence of and attested by three or more credible witnesses." And the question is, whether the condition prescribed has been duly performed. The formalities insisted on by the creator of the power in question, and therefore essential to its proper execution, are of two kinds, which may be separately considered. First, those required to be observed by the appointor; and secondly, those required to be observed by the witnesses to the appointment. The one must sign, seal and publish in *their* presence, the others must *attest*.

First, then, of the witnesses to the appointment. They *must attest*. We are here brought face to face with the first difficulty. What is an attestation? The derivation of the word is clear and simple "testor ad," and although I do not find any judicial definition of its meaning, I conceive it to be *a written statement of each separate fact, essential to the formal execution of the power, subscribed by the witnesses*. Thus, in the case of *Moodie* v. *Reid* (*a*), *Gibbs* C. J. said, "It is established by the case of *Wright* v. *Wakeford* (*b*), that the witnesses must attest every thing that is necessary to the execution of the power," and "therefore there must be some attestation here of signing and *publication*." And in that case the power was held to be badly executed, because the attestation did not state the *publication*, but only the signing. And in *Doe* v. *Peach* (*c*), the execution was held bad, because the attestation stated only sealing and delivering, and not *signing*. But although in every attestation there must be a written statement of each separate fact essential to the formal execution of the power, yet it does not seem absolutely necessary that such attestation should be contained in an *attestation* clause or memorandum, subsequent to the signature of the appointor, and distinct and separate from the testimonium clause. In some cases, where there has been no such separate memorandum, the

(*a*) 7 Taunt. 355.
(*b*) 4 Taunt. 213.
(*c*) 2 Man. & S. 376.

testimonium clause of the will itself has been considered as the attestation clause, and the statements therein contained have been held the same for all purposes of attestation. In the case of *Moodie* v. *Reid* (*a*), before cited, there was no separate attestation clause, but the concluding clause in the will run in the following terms: "These my bequeaths, signed by me this 4th day," on which followed the signature of the appointor, and the witnesses. Here it was held that the signature was attested and nothing else. The case before us therefore so far resembles the case of *Moodie* v. *Reid* (*a*), that there is no separate attestation clause, and the will concludes with the following sentence: "In witness whereof I have to this my last will and testament set my hand and seal, the 12th day of September, in the year of our Lord 1789." This sentence, therefore, may be considered as the attestation clause, and we are thus brought to the question, whether, if this clause contains an insufficient attestation, we can look back to the body of the will in order to aid the imperfection. I conceive not. It has been decided, that where the distinct attestation clause is imperfect, it cannot be aided by statements in the body of the will. Thus, in *Doe* v. *Peach* (*b*), where, in order to constitute the execution a sufficient execution, it was necessary that it should be under *hand* and seal and attested, and the attestation contained a statement of "sealing and delivering" only, although the body of the instrument expressly stated it to be *signed* and sealed, yet it was not permitted to call the terms in the *body* of the will in aid of the attestation clause, and the execution was held bad in consequence. If, therefore, the *testimonial* clause is to be considered as the attestation clause, it seems but rational to apply the same rules in the interpretation which would have operated upon the attestation clause itself, had it existed in a separate form. In such case it would have been impossible to look beyond the clause itself *into the body of*

(*a*) 7 Taunt. 355. (*b*) 2 Mau. & Sel. 376.

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the will, in order to supply expressions necessary to give validity to the appointment; and the same principle, when applied to the testimonial clause, will exclude any terms which are not contained in it, although they might be disclosed in a former part of the instrument, and might be necessary to give the instrument validity. If the rule has been so closely and rigidly adhered to in the case of the attestation clause, we are surely prohibited from extending any special indulgence to the testimonial clause, which is merely its substitute. The jealousy of the law in such cases was exemplified in the case of *Stanhope* v. *Keir* (*a*). In which case there was an attestation clause running in the following terms: "Signed, *Eugenia Keir*, in the presence of *A.*, *B.*, *C. D.*" This clause was immediately preceded by a sentence thus expressed, "And this is my last will and testament made and signed." The Vice-Chancellor refused to consider this sentence as part of the attestation, although immediately preceding and introducing the other. Those cases which have been decided in a spirit the most liberal and lenient towards the appointor of the power, have not attempted to consider as parts of the attestation any statements lying without the testimonium clause. Thus, in *Buller* v. *Burt* (*b*), the instrument concluded thus, "*signed and sealed* at Cotton aforesaid, this 13th day of September, in the year of our Lord 1813, by *L. Smith*;" then followed the names of the witnesses. It was held in this case, that the signing and sealing alone were attested. The Master of the Rolls is reported to have said, that by the subscription of the witnesses, it was affirmed that all had been done which was stated in *the body of the deed*. But we are bound to interpret such general language as *the body of the deed*, both by the manner in which it was applied in *that* case, and by the opinion of the same learned judge, as expressed on other occasions. Thus in the case of *Stanhope* v. *Keir* (*a*), he expressly declared that the witnesses could not be held acquainted with the contents of the will. Both statements

(*a*) 2 Sim. & St. 37. (*b*) 6 N. & M. 281, n.

may be reconciled by supposing that the learned judge distinguished between the *body* of the deed (which expressions were evidently intended by him to apply in *Buller* v. *Burt* (*a*) to the testimonium clause only) and the contents of the will as expressed in the judgment in *Stanhope* v. *Keir* (*b*), where no separate attestation clause existed.

Having thus stated my opinion, that the attestation must contain a statement of every fact and formality essential to a due execution of the power, and that such attestation must be found in the testimonium clause, if there be no separate attestation clause, it remains only to apply those principles to the case before us. What are the facts required to be attested? and what are the facts actually attested in the *testimonium* clause, signing, sealing and publishing, must be all virtually stated in the attestation. The attestation runs in the following terms: "In witness whereof (i. e. of something forming part of the will, and with which in consequence the witnesses are not acquainted) I have to my last will and testament, contained in this sheet, set my hand and seal." It has been suggested, and I wish I could adopt the suggestion, that the words immediately preceding the testimonium clause, viz. "*I declare this to be my last will,*" be incorporated with and read as part of it. With every inclination to overcome difficulties which are opposed to the justice of the case, I feel myself constrained to withhold my assent to this proposition; I cannot but regard it as a separate and distinct clause in every view. It is written as a separate sentence. In structure and grammatical form it is a separate sentence. The mere fact of its immediately preceding cannot make it the same sentence. By such a method of reasoning, each preceding clause in the will might be considered as part of that which follows, and the whole will would thus become one sentence. In *Stanhope* v. *Keir* (*b*), as it has been seen, a sentence of similar import preceded in a similar manner

(*a*) 6 N. & M. 281, n. (*b*) 2 Sim. & St. 37.

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the attestation clause. But the Court refused to look at it. If then the signing and sealing the will do not in themselves amount to a publication, the statement of signing and sealing the will is no statement of publication. Now it has been expressly decided in the case of *Moodie* v. *Reid* (*a*), that signing the will could not be considered as a publication. "These my bequeaths, signed by me," was the language there used, and there declared insufficient as an attestation of publication; it is not here necessary to define what publication is, since signing has been held *not* to amount to publication, and if signing be not, how can sealing be so? it is a much less operative and essential formality in respect of a will than signing is; it is an essential formality as required by the *donor* of the power, but it is only necessary because the *donor* demands it (*b*). It cannot have any other force, therefore, than that which he consents to give it, and it is evident that he did not intend that it should be an equivalent to publication, since he has required that it should not only be signed and sealed, but published also. It has been held indeed that *delivery* is a publication, and in *Ward* v. *Swift* (*c*), signing, sealing and delivery, was held to be virtually a publication, and therefore the attestation of signing, sealing, and delivering a virtual attestation of publication. But that case has no application here; we are here to decide in conformity to a long series of adjudged cases, and it appears to me that the strong current of authorities, comprehending *Wright* v. *Wakeford* (*d*), *Doe* v. *Peach* (*e*), *Buller* v. *Burt* (*f*), *Moodie* v. *Reid* (*a*), *Stanhope* v. *Keir* (*g*), *Doe* v. *Pearce* (*h*), *Ward* v. *Swift* (*c*), to which may be added *Allen* v. *Bradshaw* (*i*), (in which a very able and elaborate judgment was delivered in the Prerogative Court by Sir *Herbert Jenner*, in 1835,) are all in accordance

(*a*) 7 Taunt. 355.
(*b*) 3 Atk. 161.
(*c*) 1 C. & M. 171.
(*d*) 4 Taunt. 213.
(*e*) 2 Man. & Sel. 376.
(*f*) 6 N. & M. 281, n.
(*g*) 2 Sim. & St. 37.
(*h*) 6 Taunt. 402.
(*i*) 1 Curteis, 110.

with each other, nor do I find any one case militating against them. Whether these decisions proceeded upon narrow grounds, and whether a more liberal construction would not have more effectually promoted the administration of justice it is now too late to inquire. We are called upon "*jus dicere non jus dare*," and as I have ever thought that a *private* mischief should be endured rather than a *public inconvenience*, which follows as a consequence from stretching the law beyond its natural tone, in order to counteract the hardship of an individual case, I feel reluctantly compelled to declare my opinion that, in the present instance, there has been no sufficient attestation of the fact of publication, and consequently that the appointment is void, and that the judgment below should be reversed.

TINDAL C. J.—Upon the question arising on this special verdict, and upon which the judges who heard the argument in this Court differ in opinion, the conclusion at which my mind has arrived is, that the power created by the settlement set out in the special verdict has been well executed by the testatrix, and that the judgment of the Court below ought to be affirmed.

In order to constitute a good execution of the power set forth in the verdict, the will must not only, in point of fact, have been "signed, sealed and published in the presence of three or more credible witnesses," but it must also have been *attested* by them, that is, it must appear from the signature of those witnesses to an express memorandum to that effect at the foot or back of the will, or must be imported into such memorandum by necessary intendments from what is written on the will, that the witnesses were present at and actually saw the performance of those several requisites which, on the part of the donor of the power, have been required to be observed. No doubt exists in this case as to the *fact;* the special verdict expressly finds that all the requisites contained in the settlement by which the power is created were duly observed. The only ques-

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tion therefore for our consideration is, whether the attestation by the three witnesses is sufficient or not.

The will in question, after it has completely finished all the testamentary appointments and bequests made therein, concludes thus;—"I declare *this* only to be my last will and testament. In witness whereof I have to *this* my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September, 1789.

L. H. S." (L. S.)

And very little below the last line of the will, and near to the signature of the testatrix, the word "witness" is found to have been written, beneath which all the witnesses have subscribed their names. Now it has not been contended that any particular form of publication of a will is necessary to satisfy such a requisition; and undoubtedly it appears, so far as any authority can be found on the subject, that if the testator openly declares, in the presence of the witnesses, that the paper which the witnesses are called upon to attest was his will, it is a sufficient publication. Supposing therefore that the declaration of the testatrix at the conclusion of the will can by law be considered as part of and to be imported into the memorandum which the witnesses signed, such declaration may be taken in itself to amount in law to a publication of the will.

In considering whether such construction may be made or not, I would first observe that the instrument itself appears to consist of two distinct parts; first, of a will properly so called, containing appointments and testamentary bequests, with which the will finishes; next, and immediately following, but perfectly distinguishable from the former part, of a declaration in writing by the testatrix of the ceremonials observed by her touching the making of this will. When the testatrix says, "I declare *this* my last will and testament," she must be taken to speak of so much of the written paper as has preceded this declaration, and which comprises her testamentary dispositions; and when she continues "In witness *whereof* I have to

this my last will and testament set my hand and seal," she must, according to the plain and ordinary meaning of the words, be speaking of the same will: and even if the word "*whereof*" is to be confined strictly to the declaration which has immediately preceded, it appears to me to make no real difference; for there appears, on either supposition, a direct allegation upon the face of the will, by the testatrix herself, that she publishes her will, and that she signs and seals her will. She affirms upon the face of the will that she performs all three ceremonials; and as the general word "witness" excludes nothing, the three witnesses, by putting their names under it, attest the performance of the publication, the signing and the sealing of the will.

Against this mode of construction the first objection urged is, that the witnesses to a deed or will are not to be assumed to know the contents thereof. It may be granted that such is the rule of law; but the answer to this objection is, that they are not assumed to know the contents of the will, properly so called, but only the allegations contained at the end of it of the ceremonials observed in its execution—allegations which must have been made in order that the witnesses should know them. In the case of *Buller* v. *Burt* (*a*), which was decided by Sir *John Leach* when Master of the Rolls, and has been often referred to in the course of the argument, no such objection was allowed: on the contrary, the decision of that case turned expressly upon the reference made to the body of the deed. That learned judge says, "it must follow that where the word "witness," without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed." In that case in the body of the deed the only statement was, that it had been signed and sealed; no statement was made that it had been *delivered;* and it was upon that express ground held, that as the general word "witnesses" can af-

(*a*) 6 N. & M. 281, n.

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firm no more than the deed states, there was not in that case any attestation of the delivery, and consequently that the power was not well executed. In that case the Master of the Rolls refers to the body of the deed to restrain the application of the word "witnesses" to the particular ceremonials mentioned in the deed, for the purpose of shewing the power had not been duly executed. And shall not a similar reference be made in this case, for the purpose of setting up and supporting its execution?

The case, again, of *Moodie* v. *Reid* (*a*) is to the same effect, where the generality of the word "witness" was held to be restrained to an attestation of signature only, by reason of the word "signed," which occurs in the body of the will.

The case of *Stanhope* v. *Keir* (*b*) was decided by Sir *John Leach* on the same principle, against the due execution of the power; though it seems very difficult to reconcile with his judgment in *Buller* v. *Burt* (*c*) what is reported to have fallen from him in *Stanhope* v. *Keir* (*b*), viz. "the argument for the defendant supposes the witnesses to be *acquainted with the contents of the will:* I cannot assume more for this attestation than that they saw Mrs. *Keir* sign the instrument." Suppose in the present case, instead of the word "witnesses," written at the foot of the will, there had been written, by way of memorandum, the very same words which are found at the conclusion of the will itself—"Declared by the testatrix as her last will and testament; in witness whereof she has to this her last will and testament set her hand and seal,"—I think it must have been deemed, beyond all doubt, a sufficient attestation of the publishing, of the signing, and of the sealing: and I cannot make a sound distinction between such a case and the present, where the reference to the conclusion of the will itself must, according to the cases, be necessarily made.

(*a*) 7 Taunt. 355.
(*b*) 2 Sim. & St. 37.
(*c*) 6 N. & M. 281, n.

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Upon these grounds I think the attestation sufficient, and that the judgment of the Queen's Bench is right, and ought to be affirmed.

As the majority of the Court therefore is for reversing the judgment, the judgment of the Court of Queen's Bench will be reversed; and I may mention that as the late Mr. J. *Park* and Mr. B. *Bolland* also differed in opinion on the question, the result would have been the same if judgment had been also pronounced by those learned individuals.

Judgment reversed.

END OF HILARY TERM.

MEMORANDA.

In Hilary Term Mr. Baron *Bolland* resigned his seat in the Court of Exchequer on account of continued indisposition, and in the vacation following, *William Henry Maule*, Esq., one of her Majesty's counsel, was appointed to succeed him, and having been first called to the degree of the Coif, gave rings with the motto "Suum cuique," and took his seat in the same Court on the first day of Easter Term.

In Hilary Vacation, *William Goodenough Hayter*, Esq., of Lincoln's Inn, received a patent of precedence; and *John Stuart*, Esq., of Lincoln's Inn, *Samuel Girdlestone*, Esq., of the Middle Temple, and *Robert Vaughan Richards*, Esq., and *Griffith Richards*, Esq., of the Inner Temple, were appointed her Majesty's counsel.

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BILLS OF EXCHANGE.

See STAMP, 1.

Where a note has been indorsed for the accommodation of the maker, in order to be deposited with his creditor, to secure the debt due, if the maker of the note pays the debt, and the bill is re-delivered to him, it is no longer negotiable. Where therefore *J. H.* and *H.* being indebted to *B.* in 200*l.*, *B.* demanded security for the debt; *J. H.* and *H.* thereupon requested the defendant to indorse, for their accommodation, a promissory note to be drawn by them in order to deposit the same with *B.* by way of security for their debt. The defendant accordingly indorsed a note so drawn for 200*l.* for that purpose, and for no other intent whatsoever, and *J. H.* and *H.* delivered it to *B.*, and afterwards paid *B.* his debt, who thereupon re-delivered the note to them. The defendant being subsequently sued by a bonâ fide indorsee, to whom the note had been indorsed by *J. H.* alone:—Held, on general demurrer, that a plea setting out the above facts shewed that the note had been satisfied, and that having got back into the hands of the parties ultimately liable, it was no longer issuable, under the Stamp Act, 55 *Geo.* 3, c. 184, s. 19. *Bartrum, Public Officer, &c.*, v. *Caddy.* 207

BOROUGH.

See MUNICIPAL CORPORATION.

Borough property not rateable. See POOR, 2.

Appeal against borough rate. See APPEAL, 1.

BURGESS ROLL.

See MUNCIPAL CORPORATION, 1.

BYE LAWS.

See CORPORATION.

CAPIAS CUM PROCLAMATIONE.

Where it appeared on the face of a writ of capias cum proclamatione that a whole term had intervened between its teste and the term on which the writ of de contumace capiendo was returnable, the Court quashed the writ of capias, as not being a sufficient continuance of the prior writ. *The Queen* v. *Ricketts.* 150

CARRIER.

The duty of common carriers to carry safely, is independent of any contract made by them, and no contract need be proved in an action on the case, founded on the custom of the realm.

The declaration in case stated, that the plaintiff delivered to the defendants, and the defendants accepted a package, to be taken care of and carried and conveyed from L. to B., and then delivered to *A. B.* for reasonable reward, and thereupon it became the duty of the defendants to take due care &c., in the conveyance of the said package: plea, that the plaintiff did not deliver to the defendants. At the trial the jury found a verdict for one of the defendants and against the other:—Held, that the declaration *might* be read as charging the defendants in tort, on the general custom of the realm, and not on a contract; that the Court were bound so to read it, after verdict, and to support the finding, though against one only of the defendants. *Pozzi* v. *Shipton.* 4

CASE.

See CARRIER—MALICIOUS ARREST—SHERIFF AND SHIPPING, 2.

CERTIFICATE.

Of arbitrator, under power reserved in the reference, that cause was fit to be tried before a judge, where the judge dies before the certificate. See ARBITRATION, 3.

CERTIORARI.

See COMPENSATION, 4—CORONER.

For quashing a poor-rate, good on the face of it. See MANDAMUS, 2.
For quashing order of sessions, good on the face of it. See SESSIONS, 2.
For quashing county rate. See COUNTY RATE.

1. A prosecutor is not bound by 5 *Geo.* 2, c. 19, s. 2, to enter into recognizances, in order to get a certiorari to remove an order of sessions for quashing a conviction. *Ex parte Spencer.* 358

2. Where an act of parliament for making a railway directed that inquisitions for assessing compensation to the owners of lands required by the company, should be taken before the sheriff of the county, and that such inquisitions and judgments thereupon should be kept by the clerk of the peace among the records of the county, and be deemed records to all intents, &c.—Held, 1. that certiorari lies, even after judgment, to remove such an inquisition: 2. that the rule to show cause why the certiorari should not issue, was properly directed to the clerk of the company, although the inquisition was out of their custody.

Where a party has once failed, on account of the insufficiency of his affidavits, to obtain a rule for a certiorari, the Court, in the exercise of its discretionary power over proceedings by certiorari, will not allow him to renew his application on amended affidavits. *The Queen* v. *The Manchester and Leeds Railway Company.* 164

3. By a railway act the company were not to deviate more than 100 yards from the line marked out in the maps deposited with the clerk of the peace, and all disputes respecting damage done to any mansion were to be tried by such persons as usually sit on special juries. There was a clause taking away certiorari in respect of all proceedings taken in pursuance of the act: —Held, that this clause applied, although compensation for lands more than 100 yards from the line prescribed, and for damage done to a mansion, had been assessed before a common jury. *The Queen* v. *The Bristol and Exeter Railway Company.* 170, n.

CHARTERER.

Running down—negligence. See SHIPPING, 2.

CHILDREN.

Step-children, how removeable. See POOR, 17.

CHOSE IN ACTION.

Assignment by bankrupt. See BANKRUPT, 1.

CHURCH RATE.

When a select vestry was directed by a local act to lay a church-rate, which was to be collected in a special manner, and which was made the subject of appeal to Quarter Sessions, held, that the Court of Queen's Bench had jurisdiction to enforce the making the rate by mandamus, although a section of the act contained a saving clause, that nothing in the act was to abridge or control the rights of any person having ecclesiastical jurisdiction over any matter or

thing concerning the churches of the parish.

When the making a church-rate is enjoined on a special vestry by act of parliament, a colourable adjournment for the purpose of delay is equivalent to a distinct refusal, and therefore when a vestry was assembled on the 8th June to consider a requisition of the churchwardens to make a church-rate, and they had notice that on refusal a mandamus would be applied for; and at the meeting a resolution was passed, that the churchwardens ought to supply an estimate of the expenses required, and the vestry adjourned for ten days; the Court thought this a colourable adjournment, and awarded a mandamus. *The Queen* v. *The Select Vestry of St. Margaret's, Leicester.* 116

CHURCHWARDENS AND OVERSEERS.

Property in parish lands. See PARISH LANDS.

Signature of notice. See POOR, 11, 12.

COMMON.

What is right of, and not rateable. See POOR, 4.

COMPANY—(PUBLIC.)

See CERTIORARI, 2, 3—COMPENSATION—POOR, 1.

COMPENSATION.

See CERTIORARI, 2, 3.

Where, under a private act, a compensation jury can only be impanelled after forty days' notice in writing to the party interested, it is not competent to him, after expressly waiving his right to notice, to apply to quash the inquisition, on the ground of its not setting out such notice, or the waiver of it.

Quære, whether, under a private act authorizing the trustees of a drainage to purchase any "lands, tenements or hereditaments," for the purposes of the act, making compensation for the same, such words extend to copyholds; but held, that at all events a party could not take the objection who had treated with the company and had concealed the fact of his land being copyhold.

A private act directed a compensation jury to assess the sum to be paid for the purchase of lands, or the recompense to be made for damages or losses sustained by cutting lands, &c.; it was found on inquisition that 56*l.* was the proper sum to be paid for the land to be purchased, and for the recompence to the owner for the damage he might sustain, and the trustees were also directed to erect a hedge on the owner's land at their own expense:—Held, that as it did not appear that less compensation-money was awarded on that account, the inquisition was not void. *The Queen* v. *South Holland Drainage.* 79

2. Where a local improvement act enabled a company to purchase lands, and contained the usual clauses for a compensation jury, and also enacted, that in case the person to whom the compensation should be awarded should not be able to make a good title to the premises, it should be lawful for the company to pay the money into the Bank of England in the name of the accountant-general:—Held, that when the company, after an award made (in consequence of a difference as to the purchase-money) had objected to the title of the purchaser, the purchaser was not entitled to a mandamus to the company to pay the purchase-money into the Bank, unless he dis-

tinctly shewed to the Court that he could not make out a good title. *The Queen* v. *The Deptford Pier Company.* 128

3. By the 11 *Geo.* 4, c. lxx. the Hungerford Market Company are empowered to make compulsory purchases of land for the use of the market; and by section 19 all tenants for years, from year to year, or at will, occupiers of any part of the estate called the Hungerford House, &c., or therewith contracted to be purchased by the company, who shall or may sustain or be put unto any loss, damage or injury, in respect of any interest whatsoever, for good-will, *improvements*, tenants' fixtures, or otherwise, which they now enjoy, by reason of the passing the act, shall receive compensation from the company. While the company were treating for the purchase of certain premises, under the act, a person entered into an agreement to rent them for one year, and that if, with the owner's consent, he should hold beyond the year, he should quit, or be at liberty to quit, at any quarter day, on receiving or giving three months' notice; that he would not underlet or give up possession to any one, make any alteration without a written consent of his landlord, would keep all the glass entire, and so leave the same, together with all articles mentioned in a schedule, and all *improvements* or additions which he should make during his occupation, for the benefit of his landlord. The tenant occupied, with the consent of his landlord, for several years, while the above negotiations were proceeding. He afterwards received due notice to quit, and the purchase by the company was completed:—Held, that he was not entitled to compensation from the company in respect of improvements made by him during his occupation. *The Queen* v. *The Hungerford Market Company.* 492

4. By a local act trustees were authorized to take lands for the improvement of a harbour, and in case of disagreement with the landowner as to the price to be paid him, or of his refusal to treat, to direct a sheriff to summon a jury, by whom the price was to be assessed. If the jury gave a greater sum than offered by the trustees, or the same sum, they were to pay all the costs; if a less sum, the costs to be paid equally by both parties; and in the former event, to be recovered by a distress warrant from a magistrate:—Held, that it belonged to the trustees to have the inquisition of the jury properly drawn up, and that therefore they could not object to the sum awarded by it, or have it brought up by certiorari to quash it, on the ground that it did not state the disagreement or the refusal to treat, so as to shew that the jury had jurisdiction, and that it did not state the proportion of the sum assessed to the sum offered, so as to ascertain which party was to pay the costs. *Semble*, that a statement in the inquisition that each party appeared by counsel, was sufficient to shew their disagreement as to price, and that it was not necessary for the inquisition to find the proportion of the sum awarded to the sum offered. *The Queen* v. *Swansea Harbour.* 512

COMPETENCY—*Of Witnesses.*

See EVIDENCE.

CONDITION.

See SPECIAL CASE.

CONSIDERATION.

See ASSUMPSIT—PLEADING, 1.
Memorial of, in an annuity deed. See ANNUITY DEED.

CONSPIRACY.

See CRIMINAL LAW, 1.

CONTEMPT.

Attachment for. See HABEAS CORPUS.

CONTINUANCE.

Of writs. See CAPIAS CUM PROCLAMATIONE.
Plea, puis darrein. See PLEADING, 2.

CONTRACT.

See CARRIER—SHIPPING, 1—VENDOR AND PURCHASER.

B., by a memorandum of agreement signed by himself only, agreed to work for the plaintiff, "manufacturer of powder flasks, and for no other person whatsoever, from the 17th Aug. 1833, during and until the expiration of twelve months, and so on from twelve months' end to twelve months, and until I shall give *J. S.* (plaintiff) twelve months' notice in writing to quit:" —Held, that, as this agreement contained nothing binding on the plaintiff, it was *nudum pactum*, and therefore although *B.* served under the agreement till April, 1836, when he left the service and worked for the defendant, who was shewn the agreement in question, and warned that *B.* was the plaintiff's hired servant, in an action against defendant for harbouring the plaintiff's servant, it was competent to the defendant to shew that the contract of hiring was altogether void. *Sykes* v. *Dixon.* 463

CONVERSION.

See PLEADING, 3, 9.

COPYHOLD.

See COMPENSATION, 1.

1. Where devisee for life, on admittance, has paid a full fine as on an admittance in fee, and the heir of the devisor has surrendered his reversion, the surrenderor cannot compel the lord to inrol the surrender, without payment of the fine payable in respect of the descent upon the heir. *The Queen* v. *The Manor of Dullingham.* 172
2. The Court discharged a rule for a mandamus to the lord of the manor to compel him to grant a licence for a tenant to dig brick earth, for the purpose of making bricks, there being no evidence of any custom to grant such licences, except that they had frequently been granted since 1729, on payment of 21*l.* for each acre.

By the custom of a manor the tenants had a right to demise for any period not longer than three years without a licence, and for every licence to demise for a longer period the lord was entitled to 4*d.* for every year of the term granted. Several licences were shewn, the earliest in 1729, under which various terms of years, but not exceeding forty-seven, had been granted. Under these circumstances the Court discharged a rule for a mandamus to the lord to grant a licence to demise for two several terms of forty and twenty-one years.

Quære, whether under any circumstances the Court will issue a mandamus to the lord of a manor to grant a licence to a tenant to demise. *The Queen* v. *Hale.* 293

CORONER.

The Court refused to grant a cer-

tiorari to bring up a coroner's inquisition to be quashed, which purported to be taken before *A. B.*, coroner of H., but which in reality was taken before the coroner's clerk, and which was in other respects invalid. *Ex parte Daws.* 146

CORPORATION.

See MUNICIPAL CORPORATION.

Appeal against borough rate. See APPEAL, 1.

Where the master, wardens, and assistants of a corporation were authorised by their charter to make by-laws with penalties to the use of the corporation, a by-law imposing a fine on any one of the livery refusing to take upon himself a certain office, and reserving the penalty to the master and wardens only *for the time being*, for the use of the corporation, is valid.

But where debt for the penalty was brought by parties who were the master and wardens at the time the fine was incurred, but who had ceased to be so at the time of action brought:—Held, on demurrer, that a plea that the plaintiffs were not master, &c. was good, for non constat but that they were strangers to the corporation at the time of action brought.

Semble, also that the corporation at large could not have maintained the action on this by-law, nor the master and wardens in office at the time, for the right of action did not pass to them by succession.

Quære, whether the action would have been maintainable by the late master and wardens who were in office when the penalty was incurred, if they had averred that they continued to be members of the corporation. *Graves* v. *Colby*, 235

COSTS.

See ARBITRATION, 3, 4.—PLEADING, 2.

Where the lessor of the plaintiff obtained a verdict in ejectment in 1834, and taxed his costs, and sued out a writ of possession, which was set aside in 1837, for irregularity, with costs:—Held, that, not having revived the judgment by sci. fa., he could not set off his costs on the judgment against the defendant's costs on setting aside the writ of possession.

Semble, the defendant's costs on setting aside the writ, although after final judgment, are interlocutory costs within Reg. Gen. H. T. 2 *Will.* 4. *Doe* d. *Stevens, clerk*, v. *Lord.* 388

COVENANT.

When it lies. See ASSUMPSIT, 1.

COVERTURE.

See INSOLVENT.

COUNTY RATE.

See APPEAL, 1.

On an appeal against a rate under the Middlesex County Act, 3 *Geo.* 4, c. cvii. the justices confirmed the rate, subject to the opinion of the Court of Q. B. on a case. The certiorari directed the justices to send up an order of sessions "with all things touching the same;" and the Q. B. quashed the order of sessions; the sessions, after such order, were applied to to quash the rate, but refused, as the *rate* had not been removed into the Court of Q. B., and there was no longer any appeal against it. The Court of Q. B. refused to grant a mandamus to compel them to enter continuances, and quash the rate, first, because by so doing the par-

ties who had been engaged in collecting the rate might be exposed to an action; secondly, because the Court could not compel the sessions to decide in a particular way.

A subsequent rate having been made by the Middlesex sessions, open to the same objection, pending the argument on the above case, but against which no appeal was made,—Held, that, as the objection was made express matter for an appeal to the sessions, the appellants were not entitled to have the rate quashed on certiorari, it being good upon the face of it. *The Queen* v. *The Justices of Middlesex.* 402

COURTS.

Court of Queen's Bench, its jurisdiction as to church-rate. See CHURCH RATE.

Insolvent Court, proof of its seal. See EVIDENCE, 5.

Court of Quarter Sessions. See SESSIONS.

County Court. See SHERIFF.

Westminster Court of Requests. See PLEADING, 4.

CRIMINAL LAW.

See CERTIORARI, 1.

1. An indictment charged, in the first count, that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandize, of great quantities of such merchandize, without paying for the same, with intent to obtain to themselves money and other profit. The second count charged that two of the defendants, being in partnership in trade, and being indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors.

Held, 1. That the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare; but that the count was bad for not shewing by what means they were to be defrauded.

2. That the second count was bad for not alleging facts to shew in what manner the deed of sale was fraudulent. *Peck* v. *The Queen.* 508

2. Although a party applying for a criminal information must shew himself to be an innocent party, yet the Court made absolute a rule for such information against the publisher of a libel, which affected several parties, notwithstanding that the character of the person principally attacked, and on whose affidavit (among others) the rule nisi had been obtained, was impeached on shewing cause. *The Queen* v. *Gregory.* 110

3. After a special jury had been sworn on the trial of an indictment for misdemeanor, it was discovered that one of them had sat on the grand jury who found the bill. It was proposed that he should leave the box, but the defendants objected to this course; the trial proceeded, and they were found guilty. Under these circumstances the Court refused to grant a rule for a new trial on the ground of mistrial. *The Queen* v. *Sullivan.* 96

CURATE.

A perpetual curate, whose curacy has

been augmented by a grant of lands, under the Queen *Anne*'s Bounty Acts, cannot make a lease for three lives without the consent of the ordinary. *Doe* d. *Richardson* v. *Thomas*. 578

CUSTOM.

Custom of the realm. See CARRIER.

A custom for *all* victuallers to erect booths on a common, being parcel of the waste of a manor (selected by the lord for holding fairs yearly, every fortnight), and to place *posts* and tables there, a reasonable time before the Monday next after the Feast of Pentecost, and to continue them so erected until the Feast of All Souls, each paying therefore to the lord a compensation *2d.* is good. *Smith* v. *Tyson*. 307

DAMAGES.

See SET-OFF—VENDOR AND PURCHASER, 2.

DE CONTUMACE CAPIENDO.

See CAPIAS CUM PROCLAMATIONE.

DEED.

See ANNUITY DEED.

Parol agreement to avoid. See PAROL AGREEMENT.

DEFAMATION.

See CRIMINAL LAW, 2.

1. A demurrer to a declaration in slander does not admit the particular words spoken, to have been spoken with the intent attributed to them by the innuendo.

Therefore where a declaration, after stating that the plaintiff had been in the employment of *B. G.* as a labourer, and had been employed by him in a certain barn of *B. G.* in thrashing corn, alleged that the defendant, maliciously intending to injure the plaintiff, and to cause it to be suspected that he was guilty of felony, said of the plaintiff these false &c., "I saw one *J. G.* coming across *Glass*'s barton with some barley, and my son said, what are you going to do with that? *G.* said, he was going to feed pheasants with it, and said, where he had that, he could have more, and that he had it at Farmer *Glass*'s barn," (meaning the said barn of *B. G.*, and meaning that the barley was the property of *B. G.*, and that the plaintiff had stolen the same from the said *B. G.*), and set out special damage.—Held, on demurrer, that the innuendo was not warranted by the libel or by the inducement. *Wheeler* v. *Haynes*. 55

2. Where a plea to an action of libel justifies that the facts charged against the plaintiff are true, and the comments bonâ fide, it is properly left to the jury to consider, not only whether the facts are proved, but whether the comments also are bonâ fide, if they are of themselves actionable, and are not necessary inferences from the facts. Under such a justification of a libel, imputing to the plaintiff, that he had become surety for 500*l.* on an election petition, although he was at the time in insolvent and insufficient circumstances, and adding, he was hired for the occasion; the observation that he was hired, whether taken as a statement of a distinct fact or a mere comment, is itself actionable, and the jury are to decide whether it is covered by evidence justifying the rest of the libel. *Cooper* v. *Lawson*. 15

3. The following publication was held to be no libel: "Notice. Any person giving information where any

property may be found belonging to *A. G.* a prisoner in the King's Bench prison, but residing within the rules thereof, at 3, 4, and 5, Portland Place, Borough Road, shall receive 5 per cent. upon the goods recovered, for their trouble, by applying to Mr. *Levy*, Fetter Lane, Fleet Street;" — (thereby meaning that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention;) and held that the innuendo was an addition, and not explanatory only of any previous matter alleged in the declaration. *Gompertz* v. *Levy*. 214

DEMURRER.

Admission of innuendo. See DEFAMATION, 1.

Demurrer books. See PLEADING, 13.

DEPOSIT.

See VENDOR AND PURCHASER, 2.

DEPUTATION.

See GAMEKEEPER.

DETAINER.

See ARREST.

DEVISE.

See COPYHOLD, 1— POWER—SPECIAL CASE.

1. Devise of a freehold estate to *E. H.* for life, and after her death "my will is, that my said freehold shall be sold by my executors in trust:" held, not to give the fee to the executors, but only a power. *Doe* d. *Hampton* v. *Shotter*. 124

2. A testator seised of an estate pur autre vie to himself and his heirs, by his will, after bequeathing several legacies to his children, but omitting his eldest son, made the following devise: "Also I give, bequeath and devise unto my beloved wife *A. E.* all my money, securities for money, goods, chattels and estate and effects, of what nature or kind soever and wheresoever the same may be at the time of my death:"—Held, that the word "estate" conveyed all the testator's interest in his real property, although the lease creating the estate pur autre vie contained a proviso against assignment, without the licence in writing of the lessor, and the effect therefore of a devise might be to work a forfeiture. *Doe* d. *Evans* v. *Evans and others*. 472

3. Devise of freehold premises to trustees to *set and let the* premises, and out of the rents and profits thereof to pay a debt, and in the next place to pay certain legacies, as soon as the rents and profits would permit, and after the debt and legacies were paid off, to *R. B.* in fee:—Held, that the trustees took only a chattel interest, for that the power of leasing was expressly confined to the purpose of paying off the debt and legacies. *Ackland* v. *Lutley*. 636

4. Devise of real and personal property to trustees, during the life of testator's daughter, to permit her to take the rents for life, and after her death to such of her children as she then had, or might have, if a son or sons, at his or their age of twenty-three years, or if a daughter or daughters, at her or their age of twenty-one years, as tenants in common in fee; and in case of the death of any child under the above age, the share to go over to the survivor or survivors; the rents to be applied to their maintenance until the said ages, and in case they should all die under the above ages, devise over:—Held, that the children took

vested interests, and that the devise therefore was not void for remoteness. *Doe* d. *Dolley* v. *Ward*, 568

DISCONTINUE.

Right of plaintiff to discontinue after plea of defendant's bankruptcy. See PLEADING, 2.

DISCONTINUANCE.

Of writs. See CAPIAS CUM PROCLAMATIONE.

DISTRESS.

See PLEADING, 9.

ECCLESIASTICAL LAW.

See CAPIAS CUM PROCLAMATIONE, CHURCH RATES and SEQUESTRATION.

Lease by curate. See CURATE.

EJECTMENT.

See COSTS.

For copyhold, without admittance. See SPECIAL CASE.

The owner of a cottage, divided into two parts, in 1808 put in two servants, *H.* and *W.*, to occupy it, who occupied each part severally till his death, in 1814, without paying any rent. They continued to occupy, undisturbed, after his death, till 1821, when *H.* died, having by his will devised his moiety to *W.* *H.*, some time before his death, took in *L.* to live with him, as a servant, and after *H.*'s death *L.* continued in possession:—Held, on ejectment brought by *W.*, that by proving *L.* to have come in under *H.*, he had shewn a primâ facie title.

The defendant in ejectment, who defended under the landlord's rule, proposed to call *L.*, the tenant in possession, on whom the declaration had been served, as a witness, on the ground that he was not the tenant in possession, but a mere servant:—Held, that *L.* was incompetent, as the defendant had admitted him to be tenant in possession by the rule. *Doe* d. *Willis* v. *Birchmore*. 448

ELECTION.

Of umpire. See ARBITRATION, 2.

ENTRY.

Determination of will by. See LANDLORD AND TENANT, 5.

ESTATE.

See DEVISE — EJECTMENT — PARISH LANDS—SPECIAL CASE.

ESTOPPEL.

See COMPENSATION, 1, 4—PARISH LANDS.

EVIDENCE.

See DEFAMATION, 1—EJECTMENT—HABEAS CORPUS—PLEADING, 10, 11, 12—SEQUESTRATION—STAMP.

I. *Competency of Witness.*

1. In case against a broker, for negligently delivering goods without payment, the plaintiffs called their servant, whose duty it was to deliver under the orders of the defendant, and who had delivered without such orders:—Held, that he was an interested witness, and therefore was not competent to prove that the defendant was informed of such delivery in time to stop the goods and prevent loss to the plaintiffs, and that he neglected to do so. *Boorman and others* v. *Brown*. 364

2. Overseers of a parish, on a parochial appeal, are not competent witnesses. *The Queen* v. *Bath*. 469

3. Where a witness stated on the voir

dire that "he had as agent employed the original attorney for the plaintiff; that the attorney was dead; that he was not released; that no demand had been made upon him; and that he did not state that the attorney was to look to the plaintiff, and not to himself;" and nothing further appeared to shew that the witness had an interest in the suit, or had made himself liable to the new attorney:—Held, that he was competent. *Shipton* v. *Thornton*. 276

II. *In particular Cases.*

4. Under the 7 *Geo.* 4, c. 57, s. 76, and 1 & 2 *Vict.* c. 110, s. 105, the seal of the Insolvent Debtors' Court proves itself. *Doe* d. *Duncan* v. *Edwards*. 408

5. Where a receipt has been given by one partner in the name of the firm, but without the knowledge of the other partners, such receipt is not conclusive evidence against the firm in an action by them for their demand. *Fortar and others* v. *Hutchinson*. 437

EXAMINATION.

Of articled clerk. See ATTORNEY.

EXECUTION (OF POWER.)

See POWER.

FALSE RETURN.

See HABEAS CORPUS—SHERIFF.

FIERI FACIAS.

Seizure under, when not admitted by de injuriâ. See PLEADING, 11.
False return to. See SHERIFF.

FINE.

At law it cannot be shewn that a fine levied by a lunatic was void on account of fraud. *Murley* v. *Sherren*. 126

FINE (COPYHOLD).

See COPYHOLD, 1.

FORCIBLE ENTRY.

See RESTITUTION.

FORFEITURE.

See DEVISE, 2—LANDLORD AND TENANT, 7.

FRAUDS, STATUTE OF.

In the following guarantee, "I hereby undertake to secure to you the payment of any sums of money you have advanced or may hereafter advance to Messrs. *H. D.* & Co. on their account with you," the consideration for guaranteeing past advances does not sufficiently appear, so as to satisfy the Statute of Frauds. *Raikes* v. *Todd*. 138

FRAUDULENT REMOVAL.

See PLEADING, 6.

FREIGHT.

See SHIPPING, 1.

GAMEKEEPER.

A gamekeeper acting under a deputation, granted and registered before the 1 & 2 *Will.* 4, c. 32, is not entitled to notice of action, under section 47 of that act. *Lidster* v. *Borrow*. 447

GUARANTEE.

See BANKRUPT, 2—FRAUDS, (STATUTE OF).

HABEAS CORPUS, RETURN.

1. A judge at chambers has power at common law to issue in vacation a writ of habeas corpus, returnable before himself immediately.
2. A return to a writ of habeas corpus primâ facie imports verity, and, until it is impeached, need not be supported by affidavits or otherwise.
3. *Quære*, by what mode of procedure the return may be impeached, and its truth inquired into.

   Semble. that it may be controverted by affidavits.

   Quære, whether it can be traversed in pleading, or merely confessed and avoided.
4. The Court may, in its discretion, allow the return to be amended after it has been filed.
5. The gaoler of Liverpool in a return to a habeas corpus stated that, by an act of the legislature of Upper Canada, upon the petition of any person charged with high treason preferred, before arraignment, to the Lieutenant-Governor of the province, and praying to be pardoned, the governor was empowered to pardon him on such terms as might appear proper, and that in case any person should be pardoned on condition of transportation for life or for years, and should return to the province contrary to such condition, he should suffer death. The return then stated that the prisoner was indicted for high treason, and, before arraignment, presented a petition, confessing his guilt and praying for pardon; that he received a pardon on condition that he should be transported to Van Diemen's Land for fourteen years, to commence from his arrival there; to which condition he assented; that, there being no direct means of transporting him from Upper Canada, it was necessary to take him to Quebec, in Lower Canada, whereto he was taken by the authority of the Lieutenant-Governor of Upper Canada, and by virtue of a warrant of the Lieutenant-Governor of Lower Canada was delivered to the custody of the sheriff of Quebec, until he could be transported; that there being no means of transporting the prisoner directly from Lower Canada to Van Diemen's Land, it was necessary to take him to England, and thereupon, by letters-patent, sealed with the seal of the province of Lower Canada, and directed to *A. B.*, captain of a vessel, *A. B.* was commanded to receive the prisoner, and take him to Liverpool, the same being a place which seemed fit to her Majesty, and which was the most convenient in that behalf; that *A. B.* conveyed the prisoner to Liverpool, and there not being the means of conveying him immediately to Van Diemen's Land, it became necessary that he should be delivered by *A. B.* into the custody of the gaoler of Liverpool (the party making the return) for safe custody, whilst the means for transmitting the prisoner to Van Diemen's Land were preparing with all dispatch.

   Held, that the return was not bad for any of the following objections:—

   That the prisoner was not a convict, and therefore could not be transported.

   That there was no judgment of transportation.

   That the colonial legislature could not authorize transportation *intra fines* of another territory.

   That the condition of the pardon being transportation for fourteen years, to commence from the prisoner's arrival at Van Diemen's Land, was bad for uncertainty.

   That the transportation had miscarried for want of a continued authority from the Governor of Upper Canada throughout the in-

termediate places between that province and Liverpool.

That the various documents referred to, and especially the warrant under which the prisoner was detained by the party making the return, were not set out.

Quære, if the objections had been good, whether the Court would have discharged the prisoner, if it sufficiently appeared that he was charged with treason.

6. The name of the prisoner, with the names of several other prisoners, occurred in the recital of the letters-patent set out in the return, but his name was accidentally omitted in the mandatory part of the letters. The return stated that his name occurred in the mandatory part also. The Court ordered the return to be amended so as to agree with the letters-patent, as it was improper that any false statement should appear on the records of the Court; but held that the letters were not material to justify the prisoner's detention.

The Court also refused to attach the party, making the return, for such false statement, as it did not appear to have been made wilfully. *The Queen* v. *Batcheldor*. 516

HEIR.

Ejectment for copyhold by, without admittance. See SPECIAL CASE.

HEREDITAMENTS, LANDS, &c.

When copyhold included by. See COMPENSATION, 1.

HIGHWAY.

See ROAD.

HUSBAND AND WIFE.

See INSOLVENT—POOR, 16.

HOLDING OVER.

Liability for use and occupation. See LANDLORD AND TENANT, 6.

ILLEGALITY.

Lease to alien. See LANDLORD AND TENANT, 5—POOR, 8.

IMPRISONMENT FOR DEBT ACT.

(1 & 2 *Vict. c.* 110.)

See WRITS, FORMS OF, UNDER, p. 313; AND ARREST.

INCORPOREAL HEREDITAMENT.

What is so as not to be rateable. See POOR, 4.

INDEMNITY.

Contract of, when broken. See LIMITATIONS, STATUTE OF.

INDENTURE.

As to profert. See BANKRUPT, 1.

As to memorial of annuity deed. See ANNUITY DEED.

INDICTMENT.

See CRIMINAL LAW, 1.

INFORMATION (CRIMINAL).

See CRIMINAL LAW, 2.

INNUENDO.

See DEFAMATION, 1 & 3.

INQUISITION.

See CORONER—COMPENSATION.

INSOLVENT.

Seal of Insolvent Court. See EVIDENCE, 4.

In an action against husband and wife, for a debt contracted by her

before coverture, they may plead her discharge, while a feme sole, under the Insolvent Debtors' Act. *Storr* v. *Lee*. 633

INTENDMENT.

After verdict. See CARRIER.
In award. See ARBITRATION, 5.
In special case. See SPECIAL CASE.

INTERLINEATION.

Interlineation of instrument, when special plea necessary to take advantage of. See PLEADING, 12.

INTERLOCUTORY COSTS.

See COSTS.

ISSUE.

What is issue by the pleadings. See PLEADINGS.
Issue of jury process. See PRACTICE.

JOINT TENANT.

Cannot gain a settlement under 6 *Geo. 4, c. 57*. See POOR, 6.

JUDGMENT.

Certiorari after. See CERTIORARI, 2.
Merger of judgment. See SHERIFF, 2.
Judgment recovered, plea of. See PLEADING, 5—VENDOR AND PURCHASER, 2.

JURISDICTION.

Of Court of Queen's Bench. See CHURCH RATE.
Of the full Court, generally. See ARBITRATION, 3—SPECIAL CASE.
Of judge of assize. See RESTITUTION.
Of sessions. See SESSIONS, 1 & 2.
Of magistrate. See POOR, 15.
Of arbitrator. See ARBITRATION.
Of compensation jury. See COMPENSATION, 4.

JURY.

Objection to juror. See CRIMINAL LAW, 3.
Jury process. See PRACTICE.

JUSTICE OF PEACE.

Jurisdiction of. See POOR, 15.
Qualification of. See SEQUESTRATION.

LANDLORD AND TENANT.

See EJECTMENT—PLEADING, 6.

Lease or Agreement.

1. *A.* being tenant in possession as a yearly tenant, entered into the following memorandum of agreement with *B.* his landlord, in the middle of a current half-year: *B.* agrees to let the farm of —— to *A.* for the term of fourteen years, determinable at the end of seven years, at the option of either party, upon giving twelve months' previous notice, at and for the yearly rent of 20*l.* a year, payable half-yearly, without any deduction whatever. A lease to be drawn up on the usual terms, and the said *A.* agrees to take it upon the said terms:"—Held, that the above instrument amounted to a lease, although the effect of it might be to cause a surrender of the previous term, and to merge the rent accruing due for the current half-year. *Doe* d. *Phillip* v. *Benjamin*. 440

Lease by Mortgagor.

2. Where a lease is granted by a mortgagor after the date of the mortgage, notice by the mortgagee to the tenant to pay the rent, does not constitute a tenancy between the mortgagee and tenant, so as to enable the mortgagee to distrain for rent arrear after the notice: and where after notice the mortgagee distrained for half a year's rent due Lady-day, 1833, and rent was paid by the tenant subsequently to the distress:—Held, that this did not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for the rent due previously. *Evans* v. *Elliott and others*. 256

Duration of Lease.

3. A lease for one year, and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year. *Doe* d. *Chadborn* v. *Green.* 454

4. Where a lease is to commence *from* the 25th of March then next, for twenty one years, fully to be complete and ended, the term does not end until the last moment of the 25th March in the last year. *Ackland* v. *Lutley.* 636

Determination of Will.

5. If an alien artificer takes possession of a dwelling-house under an agreement in writing, which provides for the granting of a future lease, the instrument being illegal under 32 *Hen.* 8, *c.* 16, the lessor may enter at any time and eject the tenant, although the instrument do not amount to a lease.

Quære, whether the bare entry by the lessor on the premises of a tenant at will, during his absence, and without his leave, is sufficient to determine the will. *Lapierre* v. *M'Intosh.* 629

Holding over.

6. Lessee of a term underlet the demised premises, and his undertenant held over for a portion of a year after the expiration of the term, against the will of the lessee, so that he could not give up possession to his lessor. During such holding over lessee distrained upon the undertenant for rent previously due: Held, that lessee was liable, in use and occupation, for the period of the undertenant's holding over, though not for a whole year's rent. *Ibbs* v. *Richardson.* 618

Surrender or Forfeiture.

7. A lessee who had paid his rent occasionally to a trustee, and occasionally to a cestui que trust, gave up possession on the last day of his term, but before his term was over, to the person who had been trustee, and not to the party then having the legal title: Held, that as the act was equivocal, it did not amount either to a surrender or forfeiture of the term. *Ackland* v. *Lutley.* 636

Denial of Landlord's Title.

8. To an avowry of a distress for rent the plaintiff pleaded that, before defendant had any interest in the premises, they were mortgaged in fee; that the mortgagor remained in possession, and demised to the defendant; that the defendant, the mortgage money being still due, demised to the plaintiff; that afterwards, the mortgage money being still due, and interest thereon and 14*l.* avowed for by the defendant, being also in arrear, the mortgagee gave notice to the plaintiff to pay the 14*l.* to him instead of to the defendant, and threatened, in case of non-payment, to put the law in force, and was then about to put the law in force, wherefore the plaintiff necessarily paid that sum to the mortgagee, and so the said sum was not in arrear; concluding with a verification: Held, on special demurrer, that the plea was good, being a plea of payment, and not of nil habuit in tenementis; that it was not bad for setting out the circumstances of the payment, or for concluding with a verification. *Johnson* v. *Jones.* 651

LANDS, TENEMENTS, &c.

When copyhold included by. See COMPENSATION, 1.

LEASE.

See COPYHOLD, 2—CURATE—LANDLORD AND TENANT.

LIBEL.

See CRIMINAL LAW, 2, AND DEFAMATION.

LICENCE, &c.

To demise. See COPYHOLD, 2.

LIMITATIONS (STATUTE OF).

A right to sue upon a contract of indemnity against the costs of an action is first vested when the party to whom the indemnity is given pays the bill of costs, and not when it is delivered to him, and the Statute of Limitations therefore does not begin to run against his right of action until after such payment. *Collinge* v. *Heywood.* 502

LUNATIC.

Fine levied by. See FINE.

MAGISTRATE.

See JUSTICE OF PEACE.

MALICIOUS ARREST.

Declaration, that the defendant had arrested the plaintiff, and that the plaintiff had been detained in custody until he was discharged by reason of the defendant's not having declared against him; that the defendant might have procured judgment in that suit, if he had thought fit, but that he afterwards, without any reasonable or probable cause, maliciously arrested him a second time for the same cause of action, without the leave of any judge of the Court of Exchequer, or of the King's Bench. Plea, the pendency of the former suit.—Held, on general demurrer to the plea, (Lord *Denman* C.J. *dubitante,*) that the declaration was good, as it must be taken that the second arrest was maliciously made by the defendant, without the contemplation of any benefit to himself. *Heywood* v. *Collinge.* 202

Quære, Would the declaration have been good on special demurrer? *Ibid.*

MANDAMUS.

Parties to. See MUNICIPAL CORPORATION, 2.

Mandamus generally. See CHURCH-RATE——COMPENSATION — COPYHOLD, 2——MUNICIPAL CORPORATION—SAVINGS BANK—SESSIONS.

1. It is no ground of objection to a mandamus that a requisition is made on parties in the alternative to do one of three things, if the duty enjoined by act of parliament forms one of them, and there has been a general refusal to comply with such requisition. *The Queen* v. *St. Margaret's, Leicester.* 116
2. On an appeal against a rate under the Middlesex County Act, 3 *Geo.* 4, c. cvii. the justices confirmed the rate, subject to the opinion of the Court of Queen's Bench on a case. The certiorari directed the justices to send up an order of sessions "with all things touching the same;" and the Court quashed the order of sessions; the sessions, after such order, were applied to to quash the rate, but refused, as the *rate* had not been removed into the Court of Q. B., and there was no longer any appeal against it. The Court of Q. B. refused to grant a mandamus to compel them to enter continuances, and quash the rate, first, because by so doing the parties who had been engaged in collecting the rate might be exposed to an action; secondly, because the Court could not compel the sessions to decide in a particular way.

A subsequent rate having been made by the Middlesex sessions, open to the same objection, pending the argument on the above case, but against which no appeal was made:—Held, that, as the objection was made express matter for an appeal to the sessions, the appellants were not entitled to have the rate quashed on certiorari, it being good upon the face of it. *The Queen* v. *Justices of Middlesex.* 402

MASTER AND SERVANT.

See CONTRACT.

If a person hired on an annual service as clerk, set up a claim to be partner, although in a respectful manner, and bonâ fide, he may be dismissed without notice. *Amor* v. *Fearon.* 398

As to liability for negligence of servant, see SHIPPING, 2.

MEMORIAL.

Of Annuity Deed. See ANNUITY DEED.

MERGER.

Of Judgment. See SHERIFF.

MISTRIAL.

See CRIMINAL LAW, 8.

MORTGAGOR.

Lease by. See LANDLORD AND TENANT, 2.

MUNICIPAL CORPORATION.

See CORPORATION.

Borough property not rateable. See POOR, 2.

Appeal against borough rate. See APPEAL, 1.

1. The Court will not grant a mandamus, under 1 *Vict.* c. 78, s. 24, to reinstate a person whose name has been expunged by the mayor and assessors from the burgess list, unless he proves his title, although his name may have been expunged upon an invalid notice of objection. *The Queen* v. *Harwich.* 134

Quære, Does the following subscription to a notice of objection, "*Edgar Alexander*, King's Quay Street," contain a sufficient description (within 5 & 6 *Will.* 4, c. 76, s. 17) of the objector's place of abode and of the property for which he is rated? *Ibid.*

2. A controversy existing in a corporation between the freemen under the old charter, and the town council under 5 & 6 *Will.* 4, c. 76, as to the exclusive right of the former to some corporation property to their own private use, a public meeting of the freemen was held, and a resolution was carried at the instance of *A.*, a freeman, that the rents should be paid into the hands of the defendant, to wait until the claim of the freemen should be decided: the rents having been so paid, and a rule nisi having been obtained by *A.*, as a freeman and burgess, and an inhabitant of the borough, liable to contribute to the borough rate, for a mandamus to the defendant to pay the money over into the hands of the treasurer of the borough, the Court discharged the rule: and *semble*, the parties to apply for a mandamus in such a case are the town council, treasurer, or other authorized party, and not any individual having a remote interest in the corporation funds. *The Queen* v. *Frost.* 75

NIL HABUIT IN TENEMENTIS.

See LANDLORD AND TENANT, 8.

NOMINAL CONSIDERATION.

See ANNUITY DEED.

NOTICE.

Of action. See GAMEKEEPER.
Of application for bastardy order. See POOR, 11, 12.
Waiver of notice. See COMPENSATION, 1.
Dismissal of servant without notice. See MASTER AND SERVANT.

NUDUM PACTUM.

See CONTRACT.

OFFICE.

Grant of. See ASSUMPSIT, 2.

OVERSEERS.

When incompetent witnesses. See EVIDENCE, 2.
Property in parish lands. See PARISH LANDS.
Signature of notices. See POOR, 11, 12.

PARISH LANDS.

1. A devise of lands to trustees, as to one moiety, for the relief of the most poor and needy people, of good life and conversation, of a parish, and as to the other moiety, for putting out poor boys apprentices, does not constitute the lands parish property, so as to vest them in the churchwardens and overseers of the parish, under the *59 Geo. 3*, c. 12, s. 17.

Semble, that the *59 Geo. 3*, c. 12, s. 17, does not operate to take parish property vested in *trustees* out of the trustees, and vest it in the churchwardens and overseers.

2. Parochial trustees, under the authority of a local act (17 *Geo. 3*), had built a workhouse on lands belonging to charity trustees in the same parish, and in 1821 disputes arose between the two sets of trustees, as to whether any rent was payable therefore, and the question was brought before the Master of the Rolls by an amicable suit in 1821, who decreed that a certain rent should be paid by the parochial trustees, which was accordingly paid till 1833:—Held, that use and occupation might be maintained for the rent in arrear from 1833, as the decision of the Master of the Rolls was binding upon the parties, and that the payment of rent under the circumstances was an estoppel on the parochial trustees. *Allason* v. *Stark*. 183

PAROL AGREEMENT.

To a declaration against him, as maker of a promissory note, the defendant pleaded that the note was a joint and several note by defendant and *A.*, and that *A.* had been released. Replication, that *A.* had been so released at defendant's request, and that defendant, in consideration of such release, at his request, ratified the promise in the declaration, and promised that he would remain liable on the note, as if there had been no such release:—Held, that the replication, setting up a parol contract to avoid the release, was bad. *Brooks* v. *Stewart*. 615

PARSON.

Whether a perpetual curate is. *Doe* d. *Richardson* v. *Thomas*. 578

PARTICULARS OF DEMAND.

See PLEADING, 7.

PARTIES (*to Action.*)

See BANKRUPT—CORPORATION—PARISH LANDS.

(*To Mandamus.*)

See MUNICIPAL CORPORATION, 2.

PARTNERS.

Receipt by one partner, when not binding. See EVIDENCE, 5.

PAYMENT.

When bill of exchange paid, so as to be no longer negociable. See BILLS OF EXCHANGE.
Pleas of payment. See LANDLORD AND TENANT, 8—PLEADING, 7, 8.

PENALTY.

Who to sue for. See CORPORATION.

PERPETUAL CURATE.

See CURATE.

PLEADING.

Form of action. See ASSUMPSIT—CARRIER—CORPORATION—PARISH LANDS—SHIPPING.
Parties to action. See BANKRUPT, 1.
Pleading generally. See ACCOUNT STATED——CARRIER——CRIMINAL LAW, 1—DEFAMATION—HABEAS CORPUS—INSOLVENT—LANDLORD AND TENANT, 8—MALICIOUS ARREST—PAROL AGREEMENT—SHERIFF.

I. *Declaration.*

1. Assumpsit, declaration that, in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh divers boilers of the plaintiff, the defendant promised to give them up to the plaintiff in the same condition as at the time of such consent. Averment, that by such consent the defendant weighed them, and breach:—Held, on motion to arrest judgment, that the declaration contained a good consideration for the promise. *Bainbridge* v. *Firmston.* 2

II. *Pleas.*

2. The defendant, after pleading his bankruptcy and certificate *puis darrein continuance*, cannot force the plaintiff to reply, and the latter may discontinue the action, without payment of costs. *Wollen* v. *Smith.* 374

3. To a declaration in trover by the assignee of a bankrupt, alleging a joint conversion by three defendants, two of them pleaded that, after the bankruptcy, and more than two months before the issuing of the fiat, under which the plaintiff had been appointed assignee, and before the committing of the grievance, &c., the plaintiff as assignee (to wit, by reason of the relation of his title as such assignee to the time of the bankruptcy,) was the owner of and entitled to the goods in the declaration mentioned, as of his property as such assignee; and the bankrupt was then (subject only to such title of plaintiff as aforesaid) possessed of and entitled to the said goods, and thereupon, after his bankruptcy, and more than two months before the fiat, one of the defendants bonâ fide bought at a fair price from him the said goods; that the two defendants had no notice of the act of bankruptcy; whereupon the defendant who had so purchased the goods became possessed of them as of his own property, and that while he was so possessed, and at the same time when &c., in the declaration mentioned, he, in his own right, and the other defendant, by his command, converted the said goods, which is the grievance in the declaration mentioned; without this, that at the time of the said conversion the goods were the property of the plaintiff as assignee, or of right belonged to him as assignee. Conclusion to the country:—Held, on special demurrer, that the inducement in the plea amounted to a confession and avoidance, and that the subsequent traverse, therefore, made the plea bad.

Quære, whether the plaintiff could have treated the special traverse as immaterial, and pleaded over to the inducement. *Pearson* v. *Rogers.* 302

4. Debt for 6*l.* for goods sold and delivered. Plea, as to all but 1*l.* 13*s.* nunquam indebitatus and as to 1*l.* 13*s.* *parcel*, &c. the Westminster Court of Requests' Act, with an averment "that the defendant was not indebted to the plaintiff to a greater amount than the said sum of 1*l.* 13*s.*" The defendant demurred specially to the latter plea on the grounds, first, that it was an answer to the whole action and was only pleaded to part; second, that the plaintiff could not safely take issue upon it:—Held, that as a traverse of the defendant not being indebted in more than 1*l.* 13*s.*, would have raised an immaterial issue, the plea was bad.

Semble, that the plea was not bad on the former ground, as it must be taken in connection with the previous plea of nunquam indebitatus to the residue, and that the two pleas formed but one answer to the declaration. *Burroughs* v. *Hodgson* 328

5. To a count in covenant on an annuity deed, with a breach for non-payment of the annuity on 15th of June, 1834, the defendant pleaded a judgment recovered against him by plaintiff in an action of debt, for the sum of 2000*l.*, of Easter term, 1832; concluding with an averment, that the causes of action in the two suits were identical:—Held, a bad plea, on general demurrer. *Few* v. *Backhouse.* 34

6. To trespass for breaking and entering the plaintiff's house, and taking her goods, on the 2d March, 1837, the defendants pleaded—As to the breaking and entering, &c. and taking the said goods, that one *S.* was tenant of a certain house to the defendant, under a demise at a certain rent, payable, &c.; that on the 25th Dec. 1836, rent was in arrear, and from thence until the time when, &c.; that the said goods, on the 25th Feb. 1837, they then being the property and in the possession of *S.* were fraudulently removed by him from the said demised house, and were then, with the privity and consent of the plaintiff, placed by *S.* in the house of the plaintiff. The plea then justified the entry and seizure under the 11 *Geo.* 2, c. 19, s. 1; and concluded with a verification:—Held, on special demurrer, 1, that the plea should have been confined to a justification of entering the plaintiff's house, and that her property in the goods should have been denied in a separate plea: 2, That if the plea were to be taken to deny that the goods were the plaintiff's, the denial was argumentative; or, if it were to be taken to admit them to be the plaintiff's, that the case was not then brought within 11 *Geo.* 2, c. 19; so that in either view the plea was bad: 3, That the plaintiff's possession of the goods was not admitted either in the introductory words of this plea, or in the averment that they then being the property and in the possession of *S.*, were placed in plaintiff's house with the privity and consent of the plaintiff. *Fletcher* v. *Marillier.* 354

7. Debt for 180*l.* the amount of two years' rent. Plea, as to 135*l.* parcel &c. of payment of 135*l.* to a superior landlord to avoid a distress. The replication admitted the payment, but stated that it had been deducted at the time from the rent due to the plaintiff, and that 135*l.* was due to the plaintiff, over and above the sum, &c. deducted. Rejoinder, that the said sum was not deducted *absque hoc* that 135*l.* was still due to the plaintiff. The plaintiff, in his particulars of demand, gave credit for payment of the first year's rent, minus 16*l.* 6*s.* 2*d.*, and proved that 106*l.* 16*s.* 2*d.* was due to him, after allowing for all payments:—Held (before the

Rule of Trinity term, 1838), that the particulars were not to be taken as embodied in the declaration; that the plea of payment of 135*l.* did not apply to the mere balance of 106*l.*, remaining after deduction of the sum for which credit was given in the particulars, and that the plaintiff was entitled to a verdict for such balance. *Ferguson* v. *Mahon.* 194

8. Assumpsit. Declaration for 883*l.* 16*s.*, stating that, although 664*l.* 3*s.* 6*d.*, parcel &c., had been paid, the remainder had not. Plea, payment of all sums of money in the declaration mentioned. The replication new assigned, that the action was brought not for 175*l.* 17*s.*, parcel of the monies in the declaration mentioned, but for another like sum, and denied payment of the residue. Pleas: 1, general plea of payment; and 2, denial that the cause of action new assigned was other and different, and issue thereon.—Held, that the plea to the declaration was not to be taken as pleaded to the balance only, and that the replication did not admit payment of 175*l.* 17*s.* as part of the balance, so as to entitle the defendant to a verdict on proof of payment of such a sum as, together with the 175*l.* 17*s.* admitted in the replication, was equal to such balance. *Alston* v. *Mills.* 197

9. To trover for two reclaimed deer, the defendant pleaded, 1, except as to one, actionem non, because he is not guilty; and, 2, as to that one, that he took it damage feasant in his own close, as a distress, which was the conversion complained of:—Held, on special demurrer to the latter plea, that it need not have commenced with actionem non:—Held also (*Littledale* J. dubitante) that the plea confessed and avoided a conversion; that it was not necessary for the defendant to add, that he had impounded the deer, or in what manner he had disposed of it, and that if there was any irregularity in disposing of the distress it should have been new assigned. *Weeding* v. *Aldritch.* 657

III. *Issue.*

10. In trover by the assignees of a bankrupt a plea denying that they are such assignees puts in issue the petitioning creditor's debt and the act of bankruptcy. *Buckton* v. *Frost.* 102

11. Where the defendants in trespass for entering plaintiff's house and taking his goods justified under a writ of fieri facias and warrant thereon, the replication, admitting the writ and warrant, and concluding with de injuriâ absque residuo causæ, was held not to admit the seizure under them. *Carnaby* v. *Welby.* 98

12. In an action on an express contract, which, on production at the trial, contains an interlineation in a material part, if the plaintiff prove that the instrument was originally executed without the interlineation, as in the form declared upon, the defendant cannot, on non assumpsit, contend that the alteration has made the original instrument void. *Hemming* v. *Trenery.* 661

IV. *Demurrer.*

What it admits. See DEFAMATION, 1.

13. Although the rule of Court, 9 *Geo.* 4, directs the pleadings demurred only to be set out in the demurrer books, the Court in argument may look to the whole record. *Burroughs* v. *Hodson.* 328

POOR.

See APPEAL, 2—EVIDENCE, 2—SESSIONS, 2.

I. *Rateability of Property to the Relief of the Poor.*

1. A local act of parliament recited that it would be of great utility to

the public to build a bridge, and empowered a Company to raise a capital sum amongst themselves by shares, and to borrow a further sum, by mortgage or annuity, for the building thereof, and authorized tolls to be taken, and enacted that the tolls should be applied first in discharging the expenses of the act and paying the mortgagees their interest, and that the surplus should be divided among the proprietors, not exceeding 7½ per cent. on their shares. The excess arising from the tolls beyond the dividend was to be applied in paying off the capital advanced by the proprietors; afterwards to pay off the mortgage debt, afterwards to form a fund for the repairs of the bridge, and then the tolls to cease altogether.

The Company raised the sums authorized under the act, and also incurred a further debt in completing the bridge. The tolls, which amounted to 1500*l.* a year, were applied in discharging this further debt and the interest of the money raised. This debt had not been wholly discharged, and no dividend to the proprietors had ever been made:—Held, that the Company had a beneficial interest in the tolls till their capital was paid off, and that they were therefore rateable to the poor's rate as occupiers of the bridge. *The Queen* v. *The Blackfriars Bridge Company.* 603

2. Corporation property of a borough within the Municipal Corporation Act, 5 & 6 *Will.* 4, c. 76, the rents and profits of which are received by the treasurer of the borough under sect. 92 of that act, is not rateable to the poor. *The Queen* v. *Liverpool.* 334

3. Saleable underwood under the 43 *Eliz.* c. 2, means such shoots from old stools as are capable of reproduction, and of being treated by the wood-owner so as to yield a succession of profits, and the circumstances to determine this question are matters of fact for the sessions.

Therefore, where a plantation of oaks was cut down last in 1786, and shoots grew up from their stools, which were occasionally weeded, and at the end of fifty years the wood-owner cut some every year, which he sold for colliery purposes and fire-wood, and the sessions decided that they were not saleable underwood; the Court held that they would not disturb their decision, although *semble*, per *Coleridge* J., that the decision was wrong upon the facts. *The Queen* v. *The Inhabitants of Narberth, North.* 590

4. Where freemen and the widows of deceased freemen of a municipal corporation enjoyed the right of depasturing an unincloased moor, of digging turves, clay, sand and marl, of cutting whins and furzes, of getting limestones and slates from the quarries, and sowing grass seeds on the moor, according to regulations framed by the corporation, and the corporation had inclosed a part of the common 100 years back, which they still retained in severalty; but it appeared that the rights of the freemen originated in grants of right of common and turbary, and that there was no evidence to shew that any larger right had ever been granted to them, and that a rent of 2*s.* per annum, which had been reserved on the grant of the right of turbary, was still paid to the lord of the manor:—Held, that the freemen only possessed a right of common, though with large and unusual enjoyments, and that therefore it was an incorporeal tenement not rateable to the poor. *The Queen* v. *Alnwick.* 343

II. *Appeal against Poor Rate.*

5. The Parochial Assessment Act

(6 & 7 *Will.* 4, c. 96, s. 6,) enacts that the decision of the special petty sessions shall be binding, unless notice of appeal be given within 14 days after the decision, and a recognizance be entered into *within five days* of such notice before some justice of the peace. Where recognizances were duly entered into within the five days, and a minute of the recognizances was entered in the minute book by the clerk of the peace, but the recognizance itself was not then drawn up and signed by a justice of the peace; the Court held that the words of the statute were satisfied, and therefore on appeal to the quarter sessions, where the recognizances were produced without the signature of any justice, and it appeared that by inadvertence the record had been sent by the clerk of the petty sessions to the clerk of the quarter sessions without such signature, and the sessions quashed the appeal on the ground of the recognizance being invalid, this Court issued a mandamus to the quarter sessions to enter continuances, and hear the appeal. *The Queen* v. *St. Alban's.* 148

III. *Settlement.*

By Renting a Tenement.

6. Under 6 *Geo.* 4, c. 57, no settlement is gained by the hiring and occupation of a tenement as joint-tenant, although the half of the rent paid by the pauper amount to 10*l.* *The Queen* v. *Caverswall.* 426

7. In 1813 the pauper's children were engaged to work at a mill for three years. *T.*, the owner of the mill, rented three cottages in the parish of B., distant one-eighth of a mile from the mill, for the convenience of the families employed there. The pauper occupied one of the cottages, and agreed to pay 2*s.* a week for the cottage, which was to be deducted out of the children's wages. The children worked for the three years, and some of them for a longer period. The pauper occupied the cottage till 1829, when he quitted, on being required to do so, without any regular notice to quit. The pauper was never in the service of the mill-owner. On these facts the sessions decided that the pauper had gained a settlement in B. by occupying a tenement under the 13 & 14 *Car.* 2, c. 12, subject to a case.—Held, that it was a question of fact for the sessions, whether the occupation of the cottage was ancillary to the services of the children, and that on the facts stated the pauper had gained a settlement. *The Queen* v. *The Inhabitants of Bishopton.* 598

By Apprenticeship.

8. A pauper having been bound by indenture to a carpenter, met with an accident and became unable to work. He was in consequence taken home to his father's parish, by his master, for the benefit of a surgeon's attendance, whom the master promised to pay, but did not, and the pauper slept at his father's for more than 40 days, at the end of which time the indenture was cancelled. During this period the master called upon the pauper, and asked him to carry out and sell lottery tickets, on which he was to receive 1*s.* a ticket, the prizes being articles manufactured by the master in his trade:—Held, that such service was connected with the apprenticeship, and that therefore a settlement was gained by the 40 days' residence in the father's parish, though the selling the lottery tickets might be an illegal employment. *The Queen* v. *Somerby.* 180

By Payment of Rates.

9. On the 5th October, 1835, pauper took a house at 16*l.* a year,

payable quarterly, and the tenancy was determinable by a quarter's notice, given at any period. At the end of the first quarter, 10*s.* a quarter was taken off the rent. He resided in the house until the 26th September 1836, when he removed to another parish. He left some trifling property behind him in the house, and kept the key of it until the 5th October, 1836, when he completed payment of the year's rent. He was rated to all the rates made during his tenancy, and paid them all except the last rate, made on the 24th September, confirmed and allowed on the 1st October, and published on the 9th :—Held, that there was a hiring and occupation for a year under 6 *Geo.* 4, c. 57, and that he gained a settlement by payment of rates; the 4 & 5 *Will.* 4, c. 76, s. 66, which enacts that after the passing of the act no settlement shall be gained by *occupying a tenement* unless the occupier shall have paid rates in respect of such tenement for one year, not applying to settlements by payment of rates. *The Queen* v. *St. Mary Kalendar.* 497

Derivative Settlement.

10. An order of sessions in 1824, quashing an order for the removal of the pauper's mother, a widow, is material evidence, on a subsequent contest between the same parishes as to the settlement of the pauper, to shew that he was not settled in the appellant parish at the time of the quashing of such order, although he was not named therein, and was then 26 years old, it appearing that in 1817 he had gained no settlement of his own, and that he was then unemancipated.

Where it appeared that the pauper was unemancipated in 1817, the onus was cast on the parish contending that he was emancipated in 1824, to prove it, although at such last-mentioned year he was 26 years old, and in an order then made for the removal of the mother, was not included as part of her family.

For the purpose of proving that an order of removal had been quashed, the appellants put in evidence the original sessions book, being a paper book, containing the orders of the court, made up and recorded, after each sessions, by the clerk of the peace, from minutes taken by him in Court; which book he stated to be the record of their proceedings. It was headed at each sessions with the usual caption of the justices, and at the termination of the proceedings was "By the Court, (*A. B.*), Clerk of the Peace." No other record was kept of the proceedings at sessions: —Held, that this book was properly received at the sessions as evidence of the order in question, which was contained in it. *The Queen* v. *Yeaveley.* 60

IV. *Affiliation Orders.*

11. The notice of application for an order of maintenance upon the putative father of a bastard child, under 4 & 5 *Will.* 4, c. 76, ss. 72, 73, must be signed by a majority of the parish officers, including the churchwardens. *The Queen* v. *Cambridgeshire.* 249

12. Notice of an application for a bastardy order may be signed by the churchwardens and overseers of a parish, although it forms part of a union, and returns a member to the board of guardians, under 4 & 5 *Will.* 4, c. 76. *The Queen* v. *James.* 422

13. An order of filiation, made upon the oath of the mother, and upon evidence in corroboration thereof, without stating it to be of some material particular, is bad. *The Queen* v. *Read.* 413

14. In an order of affiliation under

4 & 5 *Will.* 4, c. 76, s. 72, it is not necessary that the order should contain an express adjudication that *A. B.* is the father of the child; an order following the words of the section, and stating that the justices "being satisfied" that *A. B.* is the father, is sufficient.

It is sufficient also that the order states generally that the child is chargeable to the parish making the application, by reason of the mother's inability.

Where a child becomes chargeable on the 6th March, and the following Easter sessions made an order that an application for affiliating the child should be deferred to the Midsummer sessions, on account of the putative father keeping out of the way:—Held, that the order of affiliation made at the latter sessions was not too late. *The Queen* v. *Lewis.* 112

15. Where a justice is called upon to enforce an order of filiation under 49 *Geo.* 3, c. 68, s. 3, on proof of the weekly sum ordered to be paid being due to the parish, and of the reputed father's refusal to pay, he has no jurisdiction to inquire how the weekly sum is expended: and therefore where a justice refused to commit such father to the house of correction, on the ground that the weekly sum expended by the parish officers was not wholly employed in the support of the bastard child, the Court of Queen's Bench issued a mandamus to the justice to compel him to make the committal. *The Queen* v. *Codd.* 456

V. *Removeability of Paupers.*

16. By an order of removal, dated 4th September, the wife of a prisoner confined in Bristol gaol for debt, for 100 days, expiring on November 21st, was removed from the parish where she had resided with her husband, and in which the gaol was situated, to her husband's settlement parish. During the imprisonment she had liberty to visit her husband:—Held, that the order of removal was bad, as a separation of man and wife. *The Queen* v. *Stogumber.* 409

17. Legitimate children above seven years of age, but under sixteen, of a woman who has married again, if chargeable to the parish where they reside with their mother and step-father, may be removed to their late father's settlement parish, notwithstanding the 4 & 5 *Will.* 4, c. 76, s. 57. *The Queen* v. *Stafford.* 414

VI. *Order of Removal.*

Service of.

18. A parish having an order for the removal of a pauper, must send to the other parish under s. 79 of 4 & 5 *Will.* 4, c. 76, the whole of the examinations taken before the justices, and not that part only of them on which the order was founded. *The Queen* v. *Outwell.* 610

POSSESSION.

When plaintiff's possession is sufficiently admitted in trespass.

See PLEADING, 6.

POSSESSION (WRIT OF).

See COSTS.

POWER.

See DEVISE, 1.

Lands were limited to such uses, &c. as *L.* should appoint by her last will in writing, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses. *L.* signed and sealed an instrument containing an appointment commencing thus:—"I, *L.* do publish and declare this to be my last will and

testament. In witness whereof I have to this my last will and testament set my hand and seal the 12th day, &c." The attestation was as follows:—" Witness *C. B.*, *E. B.*, *A. B.*" :—Held, a bad execution of the power by *Vaughan* J., *Parke* B., *Alderson* B., and *Coltman* J.; dissentient. *Tindal* C. J., *Bosanquet* J., and *Gurney* B. *Doe* v. *Burdett.* 670

PRACTICE.

See AFFIDAVITS—ATTORNEY—CAPIAS CUM PROCLAMATIONE — PLEADING, 14—SPECIAL CASE.

1. Where two issues were joined, one of law and another of fact, on pleas to the same count, and the issue contained an entry of *venire ad triandum* only, and not of *quam inquirendum* also, the Court set the issue and notice of trial aside, with costs for irregularity. *Codrington* v. *Lloyd.* 157
2. The defendant, after pleading his bankruptcy and certificate *puis darrein continuance*, cannot force the plaintiff to reply, and the latter may discontinue the action, without payment of costs. *Wollen* v. *Smith.* 374

PRINCIPAL AND AGENT.

Liability for negligence. See SHIPPING, 2.

The plaintiff in Calcutta wrote to his agent in England to transmit to him a sum of money through the defendants' house, to be placed to his credit there. His agent shewed his instructions to the defendants, who placed the sum in their books to the credit of their correspondents in Calcutta, and sent them a letter of advice to account for it to the plaintiff. Before this letter reached Calcutta their correspondents failed, but the defendants had, between the date of the letter and the failure, accepted bills, drawn by their correspondents before the receipt of such letter, to an amount exceeding the money paid in by the plaintiff:—Held, that the money could not be recovered from the defendants, for that they had done all that they were instructed to do, and the situation in which they stood towards their correspondents had been thereby altered. *M'Carthy* v. *Colvin.* 429

PRISONER.

Wife of, when not removeable to the place of his settlement.
See POOR, 16.

PROCESS OF COURT.

Abuse of, when actionable. See MALICIOUS ARREST.

PROFERT.

See BANKRUPT, 1.

PROPERTY.

In goods sold. See VENDOR AND PURCHASER, 1.

PROSECUTOR.

A prosecutor is not bound by 5 *Geo.* 2, c. 19, s. 2, to enter into recognizances, in order to get a certiorari to remove an order of sessions for quashing a conviction. *Ex parte Spencer.* 358

PUBLICATION.

See POWER.

PUTATIVE FATHER.

See POOR.

QUEEN'S BENCH.
Jurisdiction as to Church Rates. See CHURCH RATE.

QUEEN ANN'S BOUNTY.
See CURATE.

RAILWAY COMPANY.
See CERTIORARI, 2, 3.

RECEIPT.
See EVIDENCE, 5.

RATE.
Borough Rate. See APPEAL, 1—SESSIONS, 1.
Church Rate See CHURCH RATE.
County Rate. See APPEAL, 1—COUNTY RATE.
Poor Rate. See POOR.
Highway Rate. See ROAD.

RECOGNIZANCES.
See CERTIORARI, 1.
Under Parochial Assessment Act. See POOR, 5.

RECORD.
What is, and evidence of. See POOR, 10.

REGULÆ GENERALES.
As to the admission of attornies to practise in different Courts 1
For the forms of writs under 1 & 2 Vict. c. 110. 313

REQUESTS, COURT OF.
See PLEADING, 4.

RELEASE.
Parol agreement to avoid release. See PAROL AGREEMENT.

REMOVAL.
Of poor. See POOR.

RESTITUTION.
A judge at the assizes may in his discretion refuse to award restitution, after an indictment for a forcible entry and detainer has been found by the grand jury; and this Court has no jurisdiction to review his decision. *Reg.* v. *Harland.* 93

RETURN.
To habeas corpus. See HABEAS CORPUS.
When action lies against sheriff for false return. See SHERIFF.

ROAD.
Where a parish was divided into eight tithings, each of which, before the new Highway Act (5 & 6 *Will.* 4, c. 50), maintained its own highways separately, and after the passing of that act each of the tithings elected one or more persons as surveyors, who formed a board, and rated the tithings separately as before the act:—Held, that the parish at large had no power to form a board under sect. 18, and that the rate made by them was accordingly bad. *The Queen* v. *Bush.* 586

RULE.
Direction of, and second application for. See CERTIORARI, 2.
New rules for the admission of attornies in different Courts. 1
For forms of writs under 1 & 2 *Vict.* c. 110. 313

SALE.
See VENDOR AND PURCHASER.

SAVINGS BANK.

See ARBITRATION, 1.

SCIRE FACIAS.

See COSTS.

SEAL.

Of Insolvent Court proves itself. *Doe* d. *Duncan* v. *Edwards.* 408

SEQUESTRATION.

Production of the judgment roll and of the writs of execution issued thereupon, one of which is a writ of sequestrari facias to the bishop, is good evidence that a benefice has been sequestered, although the judgment roll does not contain an award of the latter writ.

A sequestration is a charge upon the benefice of a clergyman within the 18 *Geo.* 2, c. 20, and it is immaterial in this respect in what manner the sequestrator has disposed of the rents and profits.

Although the incumbent of a benefice is bound to reside and perform the duties in his benefice, notwithstanding his living is sequestered, if the bishop under the sequestration assign him the vicarage house and a stipend for his services, he receives the stipend not in his right as vicar, but under the bishop's licence, and therefore he cannot calculate the stipend as a freehold qualification under 18 *Geo.* 2, c. 20, s. 1.

A sequestration is a charge upon all the rents and profits, including the glebe lands, of the benefice, except the parsonage-house, in which the incumbent is bound to reside. *Pack, qui tam &c.*, v. *Tarpley, clerk.* 478

SERVANT.

Dismissal of, without notice. See MASTER AND SERVANT.

SESSIONS.

See APPEAL, 1, 2.

Record of sessions. See POOR, 5, 10.

1. On an appeal against a borough rate, at the Epiphany sessions, the town clerk, who appeared for the respondents (the town council), objected that the appeal ought to have been to an earlier sessions; but the Court of Quarter Sessions, on inspecting the rate, decided that the appeal was properly lodged. The appeal was then adjourned to the following Easter sessions, and from thence, at the request of the respondents, to the Midsummer and Michaelmas sessions successively. Previous to the Michaelmas sessions, the town council abandoned the rate as a nullity. At the Michaelmas sessions the appellants proved their notice of appeal and their notice to produce the rate, but no one appeared for the respondents, although the town clerk was present in Court. The appellants then moved for their appeal to be confirmed, with costs. The Court of Quarter Sessions decided that as there was no proof given of a rate, or, at all events, of a legal rate, it had no jurisdiction:—Held, that the rate was sufficiently before the Court to give it jurisdiction. *The Queen* v. *Stamford.* 72

2. On an appeal against an order of removal to the parish or township of C., the respondents took an objection to the notice of the grounds of appeal, which the Court held was valid; but on looking at the order of removal, one of the justices stated that C. was wrongly described, as there was no township of C. maintaining its own poor, but that C. was divided into three townships, each maintaining its own poor separately: the sessions held thereupon that the order was a nullity, although the respond-

ents contended that the sessions had no jurisdiction, and that the original order should be confirmed: —Held, that although the sessions had decided the notice of appeal to be bad, their jurisdiction was not at an end, and that their order being good upon the face of it could not be quashed on certiorari.

Affidavits may be used to shew that an order of sessions, valid on the face of it, was made without jurisdiction. *The Queen* v. *Cheshire.* 88

SET-OFF.

See ARBITRATION, 5.

Set-off of costs. See COSTS.

A declaration that, in consideration that *R.*, before his bankruptcy, would sell certain goods to defendant, defendant agreed to pay for the same prompt two months, or by an acceptance, containing an averment of delivery of the goods, and of the defendant's refusal to pay by an acceptance or otherwise, whereby *R.*, before he became a bankrupt, was deprived of the use and benefit of an acceptance, and of all the benefit which would have resulted from discounting the said acceptance, and was put to great loss and inconvenience, and his estate, applicable to the discharge of his just debts, was by reason of the non-payment for the said goods much diminished in value—does not sound in unliquidated damages so as to deprive the defendant of his right of set-off under the Bankrupt Act, 6 *Geo.* 4, c. 16, s. 50.

Quære, Can injury arising to a creditor from non-payment of a debt form the subject of special damage? *Semble*, per *Coleridge* J. that it can. *Groom* v. *West.* 19

SETTLEMENT (OF POOR).

See POOR.

SHERIFF.

Case against a sheriff. The first count of the declaration stated that the plaintiff, at the county court of the defendant, as sheriff, recovered judgment against *B.*; that the plaintiff thereupon sued out a fieri facias of the defendant, directed by defendant to his bailiffs, commanding them to levy &c.; that though there were divers goods &c., yet that the defendant intending &c., did not nor would levy, and that the defendant's bailiff, by the direction of the defendant, falsely returned &c.:—Held, to disclose no cause of action against sheriff.

To a second count, for a false return to a fieri facias, on a judgment of the King's Bench against *B.*, the defendant pleaded that, after the suing out of the said writ, and after the said return, the plaintiff sued *B.* in the King's Bench on the said judgment, and recovered judgment thereon, which still remained in force, by means of which premises the said judgment in the said count mentioned became merged and satisfied, the fieri facias abandoned, and the defendant discharged:—Held, on special demurrer, that the plea was no answer. *Pitcher* v. *King.* 297

SHIPPING.

1. The freighter of goods on board a general ship, on which freight was to be paid on delivery at the port of destination, is bound to pay the whole freight originally contracted for, where transhipment has been found necessary and the goods have been delivered at the port of destination, although the master of the ship consigned the goods under fresh bills of lading in the second vessel to his own agent, and the freight was at a much lower rate than that originally contracted for.

Semble, also, that if the freight in the second vessel exceeded that contracted for by the original bill of lading, the freighter would be liable for the additional freight also. *Shipton* v. *Thornton*. 216

2. A steam-vessel was under charter-party for six months, the owners to keep it in order, for the conveyance of goods &c. from Newcastle and Goole, or such other coasting station as the charterer might from time to time employ it in. The crew were appointed by the owners, but paid by the charterer, who was also to pay all disbursements. The charterer did not interfere with the navigation of the vessel, but while he was on board, through the negligence of the crew, it ran against and injured the plaintiff's keel:—Held, on action brought against the owners, that they were liable. *Fenton* v. *The Dublin Steam Packet Company*. 106

SLANDER.

See DEFAMATION.

SPECIAL CASE.

On a special case the Court will not presume any material fact, which is not expressly stated, unless power be reserved to the Court to draw inferences from the facts stated, and that power be accepted by them.

A testator, after giving a life estate to his daughter-in-law, in his real estates, devised the remainder to her son *T. T.* (who was his heir) in fee, upon condition that he should, within three months next after the death of the testator, convey certain leaseholds to his three sisters; but in case he should object or refuse to do so, upon failure thereof, he devised the real estates to his three grand-daughters. The testator died in 1808: his daughter-in-law then entered upon her life estate, and continued in possession till her death in 1827: the three grand-daughters then entered, and continued in possession up to an ejectment brought by the heirs of *T. T.*:—Held, on a special case stating the will and the above facts, that as it was not expressly stated that *T. T.* had notice of the will within the three months of the testator's death, the Court could not infer the fact, and therefore, as it did not appear that the conditional limitation had taken effect, the lessors of the plaintiff were entitled to maintain ejectment.

Quære, Whether the condition on which the limitation was to take effect would be broken by failure to convey after notice of the will, or whether an express objection or refusal was necessary?

The testator, who was seised of a copyhold, died in 1808, leaving *T. T.* his heir-at-law and devisee of the fee in reversion: *T. T.* died intestate, never having entered or been admitted to the copyhold, nor having dealt with the reversion in any way:—Held, that the heir-at-law of the testator might maintain ejectment without admittance. *Doe* d. *Taylor* v. *Crisp*. 37

STAMP.

See BILLS OF EXCHANGE—LANDLORD AND TENANT, 1.

1. The following letter, sent to the holders of the fund out of which payment is to be made, does not require a bill stamp:—"We now authorize you to pay to Messrs. *R.* & Co. (having revoked the former order in their favour), after you have paid yourselves the balance we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of said shipments, pro-

vided the same shall not exceed the sum of 5000*l.* *H.* & *J.*"
The defendants carried on business as a commission house at Liverpool, and were connected with several houses abroad in which they were partners, but the foreign partners were not partners in the Liverpool house. *H.* & *J.* were in the habit of consigning goods to the defendants, to be sent abroad to their foreign houses for sale, and the proceeds were remitted to the defendants on account of *H.* & *J.* *H.* & *J.* being indebted to *R.* & Co., wrote the above letter to the defendants; on which the defendants wrote to *R.* & Co., stating they would pay the money accordingly on receiving their guarantee, which *R.* & Co. thereupon gave. Before the proceeds were received by the defendants, *H.* & *J.* became bankrupts, and their assignees gave the defendants notice not to pay anything on account of the bankrupts: —Held, on the goods being afterwards received and sold by the defendants, that the proceeds were not recoverable by the assignees, as the letter of *H.* & *J.* contained a specific appropriation or an equitable assignment to *R.* & Co., which was not revocable by the bankrupts or their assignees. *Hutchinson* v. *Heyworth*. 266

2. A cargo of goods, part of which belonged to *T.* separately, and part to *T.* & *W.* as partners, being in the hands of the consignee, *T.*, on application for both parcels, signed an undertaking in the name of *T.* & *W.* to pay freight for them, but commencing with "I hereby engage to pay;" and the goods were delivered to him. On an action against *T.* for the freight on his own parcel, the agreement was produced, with a single stamp impressed, and held admissible, because although the agreement related to the goods of the partnership as well as his own, he could not bind his partner as to the latter, but had made himself personally liable for the whole, and therefore the agreement was entire. *Shipton* v. *Thornton*. 216

STATUTES.

I. *Decisions on General Statutes.*

32 *Hen.* 8, c. 16. (Lease to alien.) See LANDLORD AND TENANT, 5.

43 *Eliz.* c. 2. See POOR, 3.

21 *Jac.* 1, c. 16. See LIMITATIONS (STATUTE OF).

13 & 14 *Car.* 2, c. 12. See POOR, 7.

29 *Car.* 2, c. 2. See FRAUDS (STATUTE OF).

3 *W.* & *M.* c. 11, s. 8. See POOR, 8.

5 *Geo.* 2, c. 19, s. 2. See CERTIORARI, 1.

11 *Geo.* 2, c. 19. (Fraudulent removal.) See PLEADING, 6.

18 *Geo.* 2, c. 20. (Qualification of magistrates.) See SEQUESTRATION.

49 *Geo.* 3, c. 68. See POOR, 15.

53 *Geo.* 3, c. 141, s. 2. See ANNUITY DEED.

54 *Geo.* 3, c. 170, s. 9. (Competency of overseers.) See EVIDENCE, 2.

55 *Geo.* 3, c. 51, s. 14. (County rate.) See APPEAL.

55 *Geo.* 3, c. 184. (Stamp.) See BILLS OF EXCHANGE.

59 *Geo.* 3, c. 12, s. 17. (Parish property.) See PARISH LANDS.

6 *Geo.* 4, c. 16, s. 50. (Bankrupt.) See SET-OFF.

6 *Geo.* 4, c. 16, s. 59. (Bankrupt.) See PLEADING, 2.

6 *Geo.* 4, c. 57. (Renting a tenement.) See POOR, 6, 7.

7 *Geo.* 4, c. 57. See INSOLVENT—EVIDENCE, 4.

9 *Geo.* 4, c. 92, s. 45. (Savings' Bank.) See ARBITRATION, 1.

1 & 2 *Will.* 4, c. 32. See GAMEKEEPER.

4 & 5 *Will.* 4, c. 76. See POOR.

5 & 6 *Will.* 4, c. 50. See ROAD.

5 & 6 *Will.* 4, c. 76. See APPEAL—POOR, 2—MUNICIPAL CORPORATION.

6 & 7 *Will.* 4, c. 96, s. 6. (Parochial Assessment Act.) See POOR, 5.

1 *Vict.* c. 78, s. 24. See MUNICIPAL CORPORATION, 1.

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II. *On Local Statutes.*

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Kensington, St. Mary's. See PARISH LANDS.

Leicester, St. Margaret's. See CHURCH RATE.

Manchester and Leeds Railway. See CERTIORARI, 2.

Middlesex County Rate. See MANDAMUS, 2.

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What is rateable underwood. See POOR, 3.

UNDER TENANT.

Holding over by, when it renders lessee liable for rent. See LANDLORD AND TENANT, 6.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 6—PARISH LANDS.

VENDOR AND PURCHASER.

1. Vendor by a delivery order directed the defendants, who were wharfingers, to deliver to the vendee 1028 bushels of oats, bin 40, to be weighed over, and the expense of weighing to be charged to the vendor. The vendee thereupon gave an order to the same effect on a sale to the plaintiffs. There were no other oats in the bin, and they were transferred to the plaintiffs in the defendants' books, but never weighed over. The vendor, on the failure of the first vendee, claimed a right of stoppage in transitu:—Held, without reference to any estoppel against the defendants, the wharfingers, that the property had passed as between buyer and seller, so as to defeat the vendor's right of stoppage. *Swanwick* v. *Sothern.* 648

2. By an agreement for the purchase of a public-house, 300*l.* was paid by the purchaser, (*by way of deposit and in part* of the purchase money). The purchase was to be completed on a certain day, and it was agreed that if either party should refuse to perform the agreement, he should pay the other 1000*l.* liquidated damages:—Held, that on this agreement it was not intended that the 300*l.* should be forfeited on the failure of the purchaser to complete the contract.

On the day for completing the purchase, the purchaser threw up the contract, on the ground that the vendor was not ready to complete, and sued him in special assumpsit for the 1000*l.* liquidated damages, and for 300*l.* money had and received. The jury found a verdict for the defendant, the vendor, on the ground that he was ready to complete the contract. After the writ was sued out against the vendor, he disposed of the public-house to another party, and the purchaser again sued him for 300*l.* money had and received:—Held, that as the former action failed, on the sole ground that it was prematurely brought, the judgment in it was no bar, and that as the parties did not intend the 300*l.* to be forfeited as a deposit, the purchaser was entitled to recover it back. *Palmer* v. *Temple.* 379

VENIRE.

Tam ad triandum, &c. See PRACTICE.

VERDICT.

Against one of several defendants in an action quasi ex contractû. Intendment after verdict. See CARRIER.

VICAR.

Whether a perpetual curate is. *Doe* d. *Richardson* v. *Thomas.* 578

VOIR DIRE.

See EVIDENCE.

WESTMINSTER COURT OF REQUESTS.

See PLEADING, 4.

WILL (DETERMINATION OF.)

See LANDLORD AND TENANT, 5.

WRITS.

Forms of, under 1 & 2 *Vict.* c. 110. 13

Continuance of, see CAPIAS CUM PROCLAMATIONE.



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